EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 2023

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, Partners Doing Business as MEYER, WILSON & COMPANY,

Plaintiffs in Error,

vs.

EVERETT PULP & PAPER COMPANY,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Presented by U. S. Grant
Cook's Voyages

No. 2023

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In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs in Error.*

vs.

EVERETT PULP & PAPER COMPANY, *Defendant in Error.*

No. 1641.

NAMES AND ADDRESSES OF COUNSEL.

GEORGE H. WILLIAMS, Esq.,
Spalding Building, Portland, Oregon.
CHARLES E. S. WOOD, Esq.,
Spalding Building, Portland, Oregon.
STEWART B. LINTHICUM, Esq.,
Spalding Building, Portland, Oregon.
ISAAC D. HUNT, Esq.,
Spalding Building, Portland, Oregon.
WILLIAM A. PETERS, Esq.,
New York Building, Seattle, Washington.
J. H. POWELL, Esq.,
New York Building, Seattle, Washington.
Attorneys for Plaintiffs in Error.

F. H. BROWNELL, Esq.,
Everett, Washington.
J. A. COLEMAN, Esq.,
Everett, Washington.
Attorneys for Defendant in Error.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

The above named plaintiffs, for cause of action against the above named defendant, allege as follows:

I.

At all the times hereinafter set forth the plaintiffs, H. L. E. Meyer, George H. C. Meyer and H. L. E. Meyer, Jr., were and still are citizens of the State of California, and residents and inhabitants thereof; and plaintiffs, John Wedderburn Wilson and John M. Quaile were and still are subjects of his Majesty, the King of Great Britain and Ireland, and were and still are citizens of the Kingdom of Great Britain and Ireland and residents and inhabitants thereof; and all of the plaintiffs were and still are partners doing business as Meyer, Wilson & Company.

II.

At all the times hereinafter set forth the defendant, Everett Pulp & Paper Company, was and still is a corporation organized and existing under and by virtue of the laws of the State of Washington, and at all of such times said defendant was

and still is a citizen of the State of Washington and a resident and inhabitant thereof.

III.

The amount in controversy herein, exclusive of interest and costs, exceeds the sum of two thousand dollars ($2,000), and is, to-wit, the sum of six thousand two hundred and seventy-two dollars.

IV.

Heretofore, and on the 15th day of October, 1906, plaintiffs and defendant entered into a certain contract in writing wherein and whereby the plaintiffs agreed to sell to the defendant, and the defendant agreed to purchase from the plaintiffs, about three hundred (300) to four hundred (400) tons of twenty-two hundred and forty (2240) pounds each of China clay in casks, of the brand known as the P. X. Y. brand, at the rate of seventy (70) cents per one hundred (100) pounds, net invoice weight, ex ship at Seattle, Washington.

Such sale was made for shipment per the ship Mozambique from Leith, Scotland, or Tyne, England, to Seattle. Delivery was to be taken by the purchaser from alongside the vessel at once on discharge at Seattle, Washington; such clay to be at the risk of purchasers, and wharfage, if any, at Seattle, Washington, to be for the account of the purchaser.

Pursuant to said contract, the plaintiffs delivered on board the said ship Mozambique at Newcastle-on-the-Tyne, England, sixteen hundred (1600) casks of China clay of the P. X. Y. brand, the gross weight of which was four hundred and twenty-five tons, containing nine hundred and fifty-two thousand (952,000) pounds, and the tare on which barrels was twenty-five tons, containing fifty-six thousand (56,000) pounds, making the total net weight four hundred (400) tons, containing eight hundred and ninety-six thousand (896,000 pounds; all as shown by the invoice weights thereof as paid for by plaintiffs to the sellers to them of such clay.

Thereafter said ship Mozambique sailed upon her voyage

from Newcastle-on-the-Tyne to Seattle, and thereafter, and prior to the 12th day of October, 1907, discharged at the dock of Galbraith-Bacon Company at Seattle, Washington, said China clay so shipped as aforesaid; and the defendant, pursuant to said contract, took delivery of said clay from alongside said ship and ex said ship at Seattle, Washington.

The contract price for said clay, so sold and delivered by plaintiffs to defendant, was the sum of sixty-two hundred and seventy-two dollars ($6272), no part of which has been paid, although long past due and payable. The terms of said sale were cash ex ship at Seattle, demand has been made by plaintiffs upon the defendant for the payment of said amount, but it refuses to pay the same or any part thereof.

Wherefore, plaintiffs demand judgment against the defendant for the sum of sixty-two hundred and seventy-two dollars ($6272), with interest thereon, from the 12th day of October, 1907, at the rate of six per cent per annum, and for their costs and disbursements herein.

WILLIAMS, WOOD & LINTHICUM,
PETERS & POWELL,
Attorneys for Plaintiffs.

United States of America,
Western District of Washington.—ss.

I, Alfred Tucker, being duly sworn, on oath say I am the Northwest manager of the plaintiffs above named; I know the contents of the foregoing complaint, and it is true as I verily believe.

ALFRED TUCKER.

Subscribed and sworn to before me this 20th day of January, 1908.

(Seal) JOHN H. POWELL,
Notary Public for Washington, residing at Seattle.

Indorsed: Complaint. Filed Jan. 20, 1908. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

United States Circuit Court for the Western District of Washington.

H. L. E. MEYER, et al.
vs.
EVERETT PULP & PAPER COMPANY.
No. 1641.

APPEARANCE.

To the Clerk of the above Entitled Court:

You will please enter our appearance as attorneys for plaintiffs in the above entitled cause. Service of all subsequent papers, except writs and process, may be made upon said plaintiffs by leaving the same with Peters & Powell, office address 546-549 New York Bldg., Seattle, Wash.

Indorsed: Appearance. Filed in the U. S. Circuit Court Western Dist. of Washington, Jan. 20, 1908. A. Reeves Ayres, Clerk. A. N. Moore, Deputy.

United States Circuit Court for the Western District of Washington.

MEYER, WILSON & COMPANY,
vs.
EVERETT PULP & PAPER CO.
No. 1641.

APPEARANCE.

To the Clerk of the above Entitled Court:

You will please enter our appearance as attorneys for the defendant, Everett Pulp & Paper Company, in the above entitled cause. Service of all subsequent papers, except writs and process, may be made upon said Everett Pulp & Paper Company, by leaving the same with Brownell & Coleman, office address, Everett, Washington.

Indorsed: Appearance. Filed in the U. S. Circuit Court, Western Dist. of Washington, Feb. 15, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs,*

vs.

EVERETT PULP & PAPER COMPANY, *Defendant.*

No. 1641.

ANSWER.

Comes now the above named defendant, and answering the complaint herein says:

I.

This defendant has no sufficient knowledge or information to form a belief as to the truth of the allegations of the first paragraph of the complaint, and therefore denies each and every allegation thereof.

II.

This defendant admits the allegations of the second paragraph of the complaint, and alleges that it has paid its annual license fee due to the State of Washington.

III.

This defendant admits that the amount in controversy herein exceeds the sum of two thousand dollars ($2000.00) but denies that it equals the sum of six thousand two hundred seventy-two dollars ($6272.00).

IV.

Referring to the fourth paragraph of the complaint, this defendant denies that said contract was entered into on the 15th day of October, 1906, and alleges that said contract was entered into on the 11th day of October, 1906, and confirmed on the 15th day of October, 1906. This defendant denies that the plaintiffs delivered or discharged at the dock of Galbraith-Bacon & Company at Seattle, Washington, sixteen hundred (1600) casks of China clay of the P. X. Y. brand, and denies that the China clay of the said brand so delivered at the said wharf, contained eight hundred and ninety-six thousand (896,000) pounds, and denies that this defendant took delivery of said clay from alongside said ship and ex said ship at Seattle, Washington.

V.

This defendant denies that the clay so sold and delivered by the plaintiffs to defendant was of the contract price of sixty-two hundred and seventy-two ($6272.00) dollars or any sum in excess of three thousand three hundred and seventy-five and 12-100 ($3375.12) dollars.

And further answering the complaint, and by way of an affirmative defense, this defendant alleges:

I.

That on or about the 11th day of October, this defendant ordered of the plaintiffs from three hundred (300) to four hundred (400) tons of P. X. Y. China clay, to be fully equal to sample which had been theretofore submitted by the plaintiffs to the defendant at the contract price of seventy ($0.70) cents per one hundred (100) pounds, ex ship at Seattle, Washington, duty paid. Said order was accepted by the plaintiffs on or about the 15th day of October, 1906, and thereafter the defendant, in the month of October, 1907, delivered on the wharf of Galbraith-Bacon & Company at Seattle, Washington, sixteen hundred (1600) casks of alleged China clay. It is not customary in the clay trade to inspect casks on board the dock

in Seattle, because of the expense and inconvenience, and pursuant to the custom existing in the trade, the said clay was forwarded to the factory or plant of the defendant at Everett, Washington, where upon an inspection it was found that of the said clay eight hundred and sixty-one (861) casks conformed to sample submitted of P. X. Y. brand, and that seven hundred and thirty-nine (739) casks were of an entirely different brand, the markings of which were almost identical with the good brand and not easily distinguishable therefrom, and that said different brand of seven hundred and thirty-nine (739) casks was far inferior to the sample submitted by the plaintiffs, and upon which the contract was based.

II.

Immediately on the discovery that there was included in the said shipment of clay casks of said different brand, and of the inferior quality, this defendant notified the plaintiffs thereof and refused to accept the shipment.

III.

At the time the defendant discovered that the plaintiffs had included in the shipment clay of a grade inferior to sample, there were still remaining on the dock of Galbraith-Bacon & Company at Seattle, Washington, two hundred and fifty-three (253) casks. This defendant promptly notified the plaintiffs that the shipment was not in accordance with sample, and after some correspondence, it was agreed between the parties that the defendant should take to its plant at Everett the remaining two hundred and fifty-three (253) casks without admission of liability for the shipment and without expense to it if defendant's claim as to the inferiority of the clay should be proved correct.

IV.

That of the two hundred and fifty-three (253) casks shipped to Everett under the agreement described in paragraph III hereof, one hundred and thirty-three (133) casks were of the

poorer brand, inferior to sample, and are now, and at all times have been held by this defendant as the property of the plaintiffs and subject to their orders, together with the six hundred and six (606) casks inferior to sample also in the hands of this defendant.

V.

That this defendant has offered, and has at all times been, and now is ready and willing to return the said six hundred and six (606) casks inferior to sample, to the wharf in the said City of Seattle, where the same were first unloaded, without expense to the plaintiffs, and here and now offers so to do, but that the plaintiffs have at all times been unwilling to receive the same and have refused to reaccept the same or any portion thereof.

VI.

That the value of the eight hundred and sixty-one (861) casks of P. X. Y. clay like the sample is three thousand three hundred and seventy-five and 12-100 ($3375.12) dollars, and the interest thereon from October 12th, 1907, to date of this answer is the sum of fifty and 63-100 ($50.63) dollars. Defendant herewith brings into the Registry of this Court the amount due therefor, to-wit: the sum of thirty-four hundred twenty-five and 75-100 ($3425.75) dollars.

Wherefore defendant prays that the plaintiffs recover no judgment herein, and that this action be dismissed without further costs to this defendant.

BROWNELL & COLEMAN,
Attorneys for Defendant,
Everett, Washington.

State of Washington,
County of Snohomish.—ss.

Wm. Howarth, being first duly sworn, according to law, deposes and says that he is the Treasurer of the Everett Pulp & Paper Company, the defendant named in the foregoing answer;

that he has read the same, knows the contents thereof, and that he believes the same to be true.

WM. HOWARTH,

Subscribed and sworn to before me this 12th day of February, 1908.

(Seal) F. H. BROWNELL,

Notary Public in and for the State of Washington, residing at Everett, Snohomish County.

Indorsed: Answer. Filed in the U. S. Circuit Court, Western Dist. of Washington, Feb. 15, 1908. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs.*

vs.

EVERETT PULP & PAPER COMPANY, *Defendant.*

No. 1641.

REPLY.

Plaintiffs, replying to the further answer and affirmative defense of the defendant, allege and deny as follows:

I.

For reply to paragraph I of the further answer and affirmative defense of the defendant, plaintiffs admit that on or about

the 11th day of October, 1906, they contracted to deliver to the defendant from three hundred (300) to four hundred (400) tons of P. X. Y. China clay of quality equal to sample theretofore submitted by them to the defendant, at the contract price of seventy cents (70) per one hundred (100) pounds ex ship at Seattle, Washington, duty paid; and that thereafter, and in the month of October, 1907, they delivered on the wharf of Galbraith-Bacon & Company at Seattle, sixteen hundred (1600) casks of clay; but they deny that a portion of the clay so delivered did not conform to sample; and deny that seven hundred thirty-nine (739) casks thereof, or any casks thereof, were far or at all inferior to the sample submitted by them to the defendant; and they deny that it is not customary in the clay trade to inspect casks on board the dock in Seattle; and they deny that any expense or inconvenience would be occasioned by inspection at Seattle; and they deny that the custom alleged in said paragraph exists; and they deny that pursuant to said alleged custom said clay was forwarded to the factory or plant of the defendant at Everett, Washington; but, on the contrary, they allege that said clay was forwarded by the defendant to Everett, Washington, because it had taken delivery of said clay pursuant to said contract on dock at Seattle, Washington, and that said clay so forwarded was the property of the defendant and so forwarded at the defendant's risk and the defendant's expense.

II.

For reply unto paragraph II of the further answer and affirmative defense of the defendant, plaintiffs deny the same and each and every allegation therein contained.

III.

For reply to paragraph III of the further answer and affirmative defense of the defendant, plaintiffs deny the same and each and every allegation therein contained.

IV.

For reply unto paragraph IV of the further answer and affirmative defense of the defendant, plaintiffs deny the same and each and every allegation therein contained.

V.

For reply unto paragraph V of the further answer and affirmative defense of the defendant, plaintiffs deny the same and each and every allegation therein contained, save and except they admit that they refused to permit the defendant to return to them any portion of the clay sold and delivered by them to the defendant.

VI.

For reply unto paragraph VI of the further answer and affirmative defense of the defendant, plaintiffs deny that eight hundred sixty-one (861) casks of the clay so sold and delivered by them to defendant is alone equal to sample; but on the contrary, they allege that all of the clay delivered by them to the defendant on the wharf of Galbraith-Bacon & Company at Seattle, Washington, is equal to sample; and they deny that interest on the money, which by said paragraph defendant alleges it has paid into court, from October 12, 1907, to the date of said answer, is the sum of fifty dollars and sixty-three cents ($50.63); but, on the contrary, they allege that interest upon said amount is at the rate of nine per cent per annum, the same being the contract and agreement of the parties.

Wherefore, plaintiffs demand judgment in accordance with the prayer of their complaint.

PETERS & POWELL,
WILLIAMS, WOOD & LINTHICUM,
Attorneys for Plaintiffs.

United States of America,
State and District of Oregon.—ss.

I, Alfred Tucker, being duly sworn, on oath say I am the Northwest manager of the plaintiffs above named, and the foregoing reply is true as I verily believe.

ALFRED TUCKER.

Subscribed and sworn to before me this 26th day of February, 1908.

(Seal) J. G. FLANDERS,
Notary Public for Oregon.

Service hereof admitted Feb. 28, 1908.

BROWNELL & COLEMAN,
Attys. for Deft.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, Nov. 1, 1910. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & CO.

Plaintiffs,

vs.

EVERETT PULP & PAPER CO.,

Defendant.

No. 1641.

MOTION.

Come now the above named plaintiffs by Williams, Wood & Linthicum, Isaac D. Hunt and Peters & Powell, their attorneys, and moves this Honorable Court for leave to file an Amended Reply in the above and within entitled cause, and for reason why same should be granted, refers to the affidavit filed herein, a copy of which is attached hereto.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
PETERS & POWELL,
Attorneys for Plaintiffs.

In the United States Circuit Court for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & CO.,

Plaintiffs,

vs.

EVERETT PULP & PAPER CO.,

Defendant.

No. 1641.

AFFIDAVIT.

United States of America,
Western District of Washington, Northern Division.—ss.

Isaac D. Hunt being first duly sworn, upon my oath do depose and say:

That I am one of the attorneys for the above and within named plaintiffs and that I make this affidavit having knowledge of the facts herein stated; that at the time the Reply in the above entitled cause was filed in this Honorable Court J. Couch Flanders, one of the members of the firm of Williams, Wood & Linthicum, was on his death-bed, but being reluctant to give up his active grasp upon the legal affairs of his office he drew the reply now on file in this Honorable Court without being thoroughly aware and familiar with the facts to be therein embraced; that your affiant has now been associated with Counsel for the plaintiff in the above entitled cause and asserts that in his belief the ends of justice would be furthered and served if the above and within named plaintiffs are allowed

to serve and file the Amended Reply which is attached hereto and made a part hereof for the inspection of this Honorable Court; that certain facts have arisen subsequent to the filing of the said Reply and such new facts are alleged and set out in the Amended Reply, hereto attached for the inspection of this Honorable Court, and which counsel desires to file in lieu thereof.

ISAAC D. HUNT,

Subscribed and sworn to before me this 28th day of October, 1910.

(Seal) JOHN J. JAMISON,

Notary Public in and for the State of Washington, residing at Seattle.

Service of within Motion and receipt of copy thereof admitted this 29th day of October, 1910.

F. H. BROWNELL,
For Defendant.

Indorsed: Motion for leave to File Amended Reply. Filed U. S. Circuit Court, Western District of Washington, Nov. 1, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

ORDER ALLOWING AMENDED REPLY TO ANSWER.

Now on this day this cause comes on for hearing upon motion of plaintiffs for leave to amend reply; the Court after hearing argument of respective counsel grants said motion. To all of which defendant excepted; said exception being allowed.

Indorsed: Order allowing amended reply. Entered United States Circuit Court, Western District of Washington, General Order Book No. 3, page 71, November 7, 1910.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & CO.,

Plaintiffs,

vs.

EVERETT PULP & PAPER CO.,

Defendant.

No. 1641.

AMENDED REPLY.

Come now the above named plaintiffs and by leave of Court first had and obtained file this their Amended Reply to the further answer and affirmative defense of the defendant and deny and allege as follows:

I.

For reply to paragraph I of the further answer and affirmative defense of the defendant, plaintiffs admit that on or about the 11th day of October, 1906, they contracted to deliver to the defendant from 300 to 400 tons of P. X. Y. China clay of a quality equal to sample theretofore submitted by them to the defendant, at the contract price of 70 cents per 100 lbs. ex ship at Seattle, Washington, duty paid, and that thereafter and in the month of October, 1907, they delivered on the wharf of Galbraith-Bacon & Co. at Seattle 1600 casks of clay, but they deny that a portion of the clay so delivered did not conform to sample, and deny that 739 casks thereof or any casks thereof, were far, or at all, inferior to the sample submitted by them to the defendant, and they deny that it is not customary in the

clay trade to inspect casks on board the dock in Seattle, and they deny that any expense or inconvenience would be occasioned by inspection at Seattle, and they deny that the custom alleged in said paragraph exists, and they deny that pursuant to said alleged custom said clay was forwarded to the factory or plant of defendant, at Everett, Washington, but on the contrary, they allege that said clay was forwarded by the defendant to Everett, Washington, because it had taken delivery of said clay pursuant to said contract, on dock at Seattle, Washington, and that said clay so forwarded was the property of the defendant and so forwarded at defendant's risk and defendant's expense.

II.

For reply to paragraph II of the further answer and affirmative defense of the defendant, plaintiffs deny the same and each and every allegation therein contained.

III.

For reply to paragraph III of the further answer and affirmative defense of defendant, plaintiffs deny the same and each and every allegation therein contained.

IV.

For reply to paragraph IV of the further answer and affirmative defense of defendant, plaintiffs deny the same and each and every allegation therein contained.

V.

For reply to paragraph V of the further answer and affirmative defense of defendant, plaintiffs deny the same and each and every allegation therein contained, save and except they admit that they refused to permit defendant to return to them any portion of the clay sold and delivered by them to the defendant.

VI.

For reply to paragraph VI of the further answer and affirmative defense of defendant, plaintiffs deny that 861 casks of the clay so sold and delivered by them to defendant are alone equal to sample, but on the contrary they allege that all the clay delivered by them to defendant on the wharf of Galbraith-Bacon & Co. at Seattle, Washington, is equal to sample and they deny that interest on the money which by said paragraph defendant alleges it has paid into Court, from October 12, 1907, to the date of said answer is the sum of $50.63, but on the contrary they allege that the interest upon said amount is at the rate of nine (9) per cent per annum, the same being the contract price and agreement of the parties.

Further replying to the further answer and affirmative defense of the defendant herein, plaintiffs allege as follows:

That the clay which the defendant pretended to reject was accepted and taken by said defendant to its manufacturing plant at Everett, Washington, and there stored by it; that the said casks of clay pretended to be rejected were placed in the open, upon the bank of a river, without any shelter or covering over the same and the defendant allowed and suffered the said clay, and now allows and suffers the same to remain in the open air without shelter or cover, exposed to the action of the wind, sun, dust, rain and snow, and further that floods occurring in the river on the banks of which the said clay had been placed, overflowed the said clay and greatly deteriorated and depreciated its value; that the said clay was not in condition to be returned to the plaintiffs herein and the same was not in the condition that it was when delivered to the defendant; that the said clay now is worthless and of no value whatsoever, the decrease and loss of value being due to the defendant's carelessness and negligence in not properly storing the clay and reasonably protecting it from the elements which so greatly damaged it.

Wherefore plaintiffs demand judgment in accordance with the prayer of their complaint.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
PETERS & POWELL,
Attorneys for Plaintiffs.

United States of America,
Western District of Washington, Northern Division.—ss.

I, Alfred Tucker, being duly sworn, on oath say: I am the Northwest manager of the plaintiffs above named, and the foregoing Reply is true as I verily believe.

ALFRED TUCKER.

Subscribed and sworn to before me this 28th day of October, 1910.

(Seal) JOHN J. JAMISON,
Notary Public in and for the State of Washington, residing at Seattle.

Service of within Amended Reply and receipt of copy thereof admitted this 29th day of October, 1910.

F. H. BROWNELL,
For Defendant.

Indorsed: Amended Reply. Filed U. S. Circuit Court, Western District of Washington, Nov. 7, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

United States Circuit Court, Western District of Washington, Northern Division.

MEYER, WILSON & COMPANY,
Plaintiffs,
vs.
EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

Filed Jan. 26. 1911.

Action at law to collect the contract price of China clay delivered pursuant to an executory contract for sale by sample. Jury waived. Trial by the Court and findings for the defendant on the ground of a breach of an implied warranty of quality.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
PETERS & POWELL,
For Plaintiffs.

F. H. BROWNELL,
For Defendant.

HANFORD, District Judge.

This is an action at law, tried by the Court, a jury trial having been waived. The action is to collect the price of 400 tons of China clay sold and delivered by the plaintiffs to the defendant. The contract for the sale of the clay was made by correspondence between the parties and as construed by the Court, it is a contract for a sale by sample, and there is an implied warranty of quality corresponding to the sample referred to in the correspondence. 15 Am. & Eng. Enc. of Law (2nd Ed.) pp. 1225-6. The clay was bought in England and transported by ship to Seattle, and there is no dispute between

the parties, as to the quantity of the clay shipped and delivered, nor as to the contract price which the defendant promised to pay therefor. It is admitted also that payment of the purchase price has been demanded and refused, except as to part, and other jurisdictional facts are admitted. The contract, as construed by the Court, obligated the defendant to receive the clay from the ship, which condition precluded inspection by the purchaser before delivery. This is so for the reason that, clay to be of the quality warranted, must be of uniform white color and free from grit, and to determine the quality, time, favorable conditions, and special conveniences for testing are necessary, and these essentials make a fair inspection while the ship is being discharged, impracticable. The defendant did not in fact inspect the clay to ascertain its quality before receiving it, but afterwards ascertained that it came from two different sources of supply and that it is not uniform in quality, 800 barrels thereof being inferior to the sample and unsuitable for the defendant's use. The defendant used and has tendered payment at the contract rate for 861 barrels, and disputes its liability to pay for 800 barrels because of the inferior quality thereof. The plaintiffs' contention is that notwithstanding the inferior quality of 800 barrels of the clay, the defendant accepted delivery of the entire consignment and by doing so waived its right to reject any part of the same. The defendant did not intend a waiver of its right to have delivered that which it had agreed to buy and pay for, viz: Clay of the same quality as the sample. On the contrary, it was prompt in giving notice to the plaintiffs of the inferior quality of the clay, and has acted fairly towards them in minimizing the loss by making use of, and tendering payment for, all of the clay fit for use and by holding the rejected portion subject to the plaintiff's right to dispose of it. The plaintiff's contention is founded upon the false idea that, the defendant was legally bound to either accept the commodity of which delivery was tendered, and pay the contract price for all of it, regardless of its quality, or else refuse to receive possession of it. This idea is contrary to the

rule of law applicable to the case, because, it ignores the implied warranty upon which the defendant had a right to rely. The defendant acted within its legal rights in taking possession of the clay and resisting the plaintiffs' demand for the price of the portion inferior to the sample. In this country the rule is well established by numerous decisions of the courts, that a breach of an implied warranty of quality entitles the vendee to retain the goods and when sued for the purchase price, to set up the breach of warranty to reduce the sum recoverable by the vendor. 15 Am. & Eng. Enc. of Law (2nd Ed.) p. 1255; 24 Id. p. 1158; *Saunders v. Short,* 86 Fed. Rep. 225; *Andrews v. Schreiber,* 93 Fed Rep, 367; *Florence Oil & Refining Co. v. Farrar,* 109 Fed. Rep. 254. The measure of damages which the vendee may claim for breach of an implied warranty of quality is the difference between the actual value of the property delivered and the higher value of the warranted quality; and if there is no other evidence of value, the price agreed to be paid will be regarded as the value of the property of the quality warranted. In this case the defendant having offered to return the inferior clay and to hold it subject to disposition by the plaintiffs, the contract price is the measure of damages which it is entitled to recoup.

The Court directs that findings be prepared in accordance with this opinion and the judgment to be entered, will be that the plaintiffs take nothing, save and except the amount of money deposited in the registry of the court by the defendant, and that the defendant recover the taxable costs occasioned by the litigation subsequent to the making of said deposit.

C. H. HANFORD, Judge.

Indorsed: Opinion. Filed U. S. Circuit Court, Western District of Washington, Jan. 26, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States, for the Western District of Washington.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, partners doing business as MEYER, WILSON COMPANY,
Plaintiffs,
vs.
EVERETT PULP & PAPER COMPANY,
Defendant.
No. 1641.

JUDGMENT.

This cause came on regularly for trial on the 8th day of December, 1910, before the Honorable C. H. Hanford, Judge of the United States Circuit Court for the Western District of Washington, at Seattle, Washington, without a jury, a jury having been waived, the plaintiff appearing by its attorneys, Williams, Wood & Linthicum and Isaac D. Hunt, Esq., and the defendant appearing by its attorney, F. H. Brownell, Esq.

And the Court having heard all of the evidence adduced by and on behalf of the plaintiff and by and on behalf of the defendant, and having duly considered the same and filed an opinion herein holding that the plaintiff is entitled to recover nothing from the defendant save and except the amount of money deposited in the registry of this Court by the defendant, and that the defendant recover the taxable costs occasioned by this litigation subsequent to the making of said deposit; and being in all things fully advised in the premises;

It is considered, ordered and adjudged that the plaintiffs take

nothing by this action save and except the money deposited herein by the defendant.

It is further considered, ordered and adjudged that the defendant have and recover of and from the plaintiff its costs and disbursements herein subsequent to the making of said deposit, and which costs are taxed at Two Hundred Thirty-nine 20-100 ($239.20) Dollars.

And it is further considered, ordered and adjudged that this action be and the same is hereby dismissed with prejudice to another action.

Dated this 27th day of April, 1911.

C. H. HANFORD, Judge.

Indorsed: Judgment. Filed U. S. Circuit Court, Western District of Washington, April 27, 1911. Samuel D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs.* vs. EVERETT PULP & PAPER COMPANY, *Defendant.*	No. 1641.

It is now stipulated by and between the above named parties, by and through their respective attorneys, that that certain

shipment of China clay ex Mozambique, now being and lying in the yards of the Everett Pulp & Paper Company, at Everett, Washington, may be sold and delivery made to a purchaser under and for the best terms obtainable, said sale to be made and conducted by the Everett Pulp & Paper Company.

It is the intention of the parties to this stipulation, and it is so understood, that if a sale be made of the said China clay ex Mozambique herein referred to, then the said sale is to be without prejudice to the rights of the plaintiffs herein to prosecute the above entitled suit now pending in the above entitled court for the full amount claimed by them, and is to be without prejudice to the above named defendant in defending the above entitled suit in the above entitled Court; it being agreed and understood by this stipulation that the sale may now be made to minimize the daily accruing loss in value to the said clay, and further that the proceeds of said sale shall be held for the use and benefit of the person or persons entitled thereto upon the final determination of the within named action.

WILLIAMS, WOOD & LINTHICUM and
ISAAC D. HUNT,
Attorneys for Plaintiffs.
F. H. BROWNELL,
Attorney for Defendant.

Indorsed: Stipulation. Filed U. S. Circuit Court, Western District of Washington, May 2, 1910. A. Reeves Ayres, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

STIPULATION.

Whereas, the above named plaintiffs have heretofore instituted an action against the above named defendant to recover a certain sum of money alleged to be due from the defendant, and

Whereas, the defendant by its answer admitted that the sum of $3425.75 is due and did enter said sum into the registry of the above entitled Court for the use and benefit of the plaintiffs, now, therefore,

It is hereby stipulated, by and between H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer, Wilson & Company, the above named plaintiffs, by Williams, Wood & Linthicum and Isaac D. Hunt, their attorneys, and the Everett Pulp & Paper Company, the above named defendant, by and through its attorneys, Francis H. Brownell and J. A. Coleman, that the above named plaintiffs may withdraw from the registery of the above named Court the sum of Three Thousand Four Hundred and Twenty-five Dollars and Seventy-five Cents ($3425.75) so deposited in the registery of the above

entitled Court by the defendant for the use and benefit of the plaintiffs.

It is further stipulated and agreed that the withdrawal of the said $3425.75 so deposited in the registery of the court by the defendant for the use and benefit of the plaintiffs, shall not in any way be deemed or taken to affect in any manner whatsoever the plaintiffs' right to appeal the above entitled case to the United States Circuit Court of Appeals, it being the intent of this stipulation that the above named plaintiffs waive none of their rights by withdrawing the said money.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
Attorneys for Plaintiffs.
FRANCIS H. BROWNELL and
J. A. COLEMAN,
Attorneys for Defendant.

Indorsed: Stipulation. Filed U. S. Circuit Court, Western District of Washington, May 5, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States, for the Western District of Washington.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER-WILSON COMPANY,
Plaintiffs,
vs.
EVERETT PULP & PAPER COMPANY,
Defendant.
No. 1641.

BILL OF EXCEPTIONS.

Now come the plaintiffs herein, H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer-Wilson Company, and each of them, by Williams, Wood & Linthicum and Isaac D. Hunt, their attorneys, and severally present this their bill of exceptions as follows:

This cause came on to be heard on the 8th day of December, 1910, before the Honorable C. H. Hanford, Judge of the United States Circuit Court, Western District of Washington, at Seattle, Washington, without a jury, a jury having been waived by all the parties, the plaintiffs appearing by Isaac D. Hunt and the defendant appearing by F. H. Brownell. All parties having announced themselves ready for trial, the following proceedings were had and testimony given:

Mr. Alfred Tucker was called on behalf of the plaintiffs and after being first duly sworn testified, among other things, on direct examination, as follows:

Q I will ask you, Mr. Tucker, whether or not at any time heretofore the Meyer, Wilson Company entered into a contract with the Everett Pulp & Paper Company?

A They did.

Q Were you the one who made the contract on behalf of the plaintiffs?

A Yes.

Q I will ask you to look at this, Mr. Thomas, and state what it is. (Hands witness paper.)

A It is the original contract between the Meyer, Wilson Company and the Everett Pulp & Paper Company.

Q I will ask you if you know whose signature this is (pointing).

A That is my signature.

Q Do you know whose signature this is (indicating)?

A Mr. Augustus Johnson.

Q Who was Mr. Augustus Johnson, if you know?

A I think Mr. Johnson was at that time purchasing agent because it was with him that I was corresponding.

MR. HUNT: I will withdraw the last question as the instrument speaks for itself. Mr. Johnson was secretary of the Company. I will ask that this be marked plaintiffs' exhibit "A."

MR. BROWNELL: I have no objection.

THE COURT: Let it be marked.

(Paper referred to was admitted in evidence and marked plaintiffs' exhibit "A.")

The contract was in words and figures as follows, to-wit:

PLAINTIFFS' EXHIBIT "A."

Original.

Meyer, Wilson & Co.
Portland, Oregon.

Meyer, Wilson & Co.,
San Francisco, Cal.

Wilson, Meyer & Co.,
Liverpool.

Received
Oct. 17, 1906.
Everett Pulp & Paper Co.

Portland, Oregon, October 15, 1906.

Messrs. Everett Pulp & Paper Co.,
Everett, Wash.

Bought of MEYER, WILSON & CO.
338 Sherlock Building.

Terms *Net Cash.*
Payable in U. S. Gold Coin
as delivered.

About Three Hundred (300) to Four Hundred (400) tons of 2240 lbs. each, China Clay in casks, P. X. Y. brand at Seventy Cents (70 cts.) per 100 lbs. net invoice weight ex ship at Seattle, Wash.

This sale is made for shipment per "Mozambique" from Leith or Tyne (P. M. W. & Co. A. T.) to Seattle. Purchasers to take delivery of China Clay from alongside vessel at once on discharged at Seattle, Wash.

Sellers not responsible for results (as affecting this agreement) of strikes, accidents, lockouts, breakdown of machinery, failure of manufacturers or suppliers, or any other circumstances beyond their control.

Contract void if vessel be lost, or for any portion or all of the China Clay which may fail to reach Seattle, owing to perils of the Sea, or other causes beyond seller's control.

This sale is based on the present tariff. Any change in the rate of duty payable to the U. S. Government to be for account of purchasers.

China Clay at risk of purchasers as soon as landed.

Wharfage, if any, at Seattle, Wash., to be for account of purchasers.

PR. PRO. MEYER, WILSON & CO.
ALFD. TUCKER,

Approved. Sellers.

EVERETT PULP & PAPER CO.,
AUGUSTUS JOHNSON, Secretary,

Approved. Purchasers.

Thereafter Mr. Alfred Tucker, on cross examination, testified, among other things, as follows, to-wit:

Q I show you a letter and ask you if this is a letter which you had written to the defendant (hands witness letter).

A I didn't write that letter.

Q Well the Meyer, Wilson Company wrote it.

A The Meyer, Wilson Company wrote it, yes.

Q Had you seen that letter before?

A Yes.

Q Saw it in the office of the Meyer, Wilson Company prior to its being sent through the mail to the Everett Pulp & Paper Company?

A Yes.

Q It was sent with your approval was it?

A Yes sir.

MR. BROWNELL: We offer the paper in evidence.

MR. HUNT: If the court please, I object to the introduction of this letter as incompetent, irrelevant and immaterial and on the further ground that they are seeking to vary a written evidence by extrinsic evidence. The contract itself is clear, plain and unambiguous on its face and provides for the quality of clay known as P. X. Y. brand. Now they are seeking to introduce other terms into that written contract, which, as I understand the law, is contrary to all rules of evidence. On that ground I desire to base my objection to this testimony and all such testimony as may be offered.

THE COURT: The letter is subsequent to the contract?

MR. BROWNELL: No sir, the letter is prior, leading up to the contract.

THE COURT: Objection overruled.

MR. HUNT: May I have an exception, your Honor?

THE COURT: Exception allowed.

(Document in question is admitted in evidence and marked defendant's exhibit "1.")

Defendant's exhibit "1" is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. "1."

Meyer, Wilson & Co.,
Portland, Oregon.
Meyer, Wilson & Co.,
San Francisco, Cal.
Wilson, Meyer & Co.,
Liverpool.

Telegraphic Addresses:
"Meyer," Portland,
"Meyer," San Francisco.
"Rodgers," Liverpool.

RECEIVED
Oct. 1, 1906.
Everett Pulp & Paper Co.

ANSWERED
Oct. 1, 1906.
Wm. Howarth.

Portland, Oregon,
Sept. 29, 1906.
Saturday.

Messrs. Everett Pulp & Paper Co.,
Everett, Wash.

Dear Sirs:

Referring to the correspondence we had heretofore with you regarding China clay, we now have the pleasure of advising you that we send you under separate cover a sample marked "P. X. Y." of an English China clay, which the makers believe matches your own sample very well, and we trust that you will find it so. It is probable that we could work your order for a

quantity of not less than 400 to 500 tons of this P. X. Y. China clay in one-half ton casks with extra iron hoops, which packages have in our previous shipments proved very satisfactory, indeed, at the price of 76½ cents per 100 lbs. ex ship at Seattle; wharfage, if any, on the goods for buyers account, as usual. Will you kindly let us know whether you are inclined to place an order with us on this basis. We have not a vessel at the present time, but our efforts are towards securing such a ship for Puget Sound. We have actually secured a vessel for the same business for Portland, Oregon, but this, of course, does not help us in any transaction with you. Sailing vessels are somehow becoming scarcer and scarcer for this destination, as owners seem to prefer to send their craft in other directions, therefore, we would suggest that it would be well to place your order with us subject to cable reply in, say a week or even a fortnight, so as to give our Liverpool House a fair chance to work up the business, and in conjunction with the same, the balance of the cargo.

We may say that freights are quite high at present, but they are also very likely to remain so for many months to come, as the demand for building material at San Francisco and also for Valparaiso has the tendency to stiffen the freight market.

One reason why we are approaching you at the present time is that we have other cargo for Puget Sound in sight, and various business has to be worked up in conjunction with the China clay to complete the transaction. We may say, when we report that the casks we use have given satisfaction, that we have a number of shipments delivered here to go by, and we have given this matter of securing a satisfactory package for China clay very considerable attention, so that it has happened repeatedly that we have delivered China clay in excellent order and condition when others received their shipments practically in bulk.

Hoping to hear from you, we are, dear sirs,

Yours very truly,

MEYER, WILSON & CO.

"If you elect to place an offer with us, we shall immediately cable same to our Liverpool House, who will then work on the matter at once and try to bring it to completion as quickly as possible.

M. W. & Co."

Mr. Tucker, being further examined, on cross examination testified, among other things, as follows:

Q I now show you another package—an envelope which has been sent through the mail. Mr. Tucker, I will ask you if that exterior—I am not speaking now of the inside contents—was the one in which the sample referred to in your letter of September 29th was enclosed?

A I cannot say. Probably.

Q You can't say from the recognition of your handwriting whether it is one of your clerk's or stenographers?

A It is my own handwriting.

Q Well if that is your own handwriting do you know you enclosed in that a sample?

A I don't remember. Probably.

MR. HUNT: What is the date of that?

MR. BROWNELL: That is the same date as the letter. Mailed the same day as the letter. We offer this in evidence.

The plaintiffs thereupon objected to the reception of the same in evidence, which objection was overruled by the Court, to which ruling the plaintiffs then and there excepted, which exception was by the Court allowed.

Mr. Tucker, being further examined, on cross examination testified, among other things, as follows:

MR. BROWNELL: It is agreed between counsel that these carbon copies shall stand in place of the original; this having been signed by Mr. Augustus Johnson.

Q Did you finally get that letter? I will also give you your answer to it.

A Yes sir.

Q In response to that and acknowledging its receipt did you

write that letter or did the Meyer, Wilson Company write that letter (hands witness letter)?

A Yes, I did.

MR. BROWNELL: We now offer in evidence a carbon copy of a letter written from the defendant to the plaintiff under date of October 11th, 1906, it being stipulated between counsel that this carbon copy is a true copy of the original.

Whereupon the plaintiffs objected as before to the introduction of the said letter, which objection was overruled by the Court, to which ruling the plaintiffs then and there duly excepted, which exception was by the Court allowed.

A copy of the said letter, marked defendant's exhibit "3," is in words and figures as follows, to-wit:

(Exhibit omitted through failure of reporter to make copy of the same.)

Immediately following the above testimony Mr. Brownell offered in evidence letters under date of October 15th, written by the plaintiff to the defendant.

The plaintiffs thereupon objected to the letters as before, which objection was overruled by the Court, to which ruling the plaintiffs then and there duly excepted, which exception was by the Court allowed.

Thereafter Augustus Johnson, a witness on behalf of the defendant, after being first duly sworn, testified among other things, on direct examination as follows:

Q Now upon receiving that sample through United States mail what did you do, if anything, with reference to the sample?

A Well, upon receipt of the sample we replied to the Meyer-Wilson Company to the effect that the price was not attractive—

Q No. But I am speaking now of what did you do first with reference to the sample?

A We examined the sample and tested it for its whiteness of color and percentage of grit. We matched it with the clay that had been formerly used and found that the sample would suit our purpose.

Q You say you made this examination. What is the use to

which clay is placed in the paper business and why is it necessary for you to examine the color and percentage of grit?

MR. HUNT: If the Court please I object to that question on the ground that it is irrelevant, incompetent and immaterial. This clay was sold as P. X. Y. brand and was not sold in relation to the works of the plaintiff. It was not sold as paper making clay. The contract speaks for itself, as P. X. Y. brand, and whatever the defendant may have endeavored or wanted to use it for is a matter immaterial to the plaintiff or to its use to be tried in this case.

Which objection was overruled by the Court, to which ruling the plaintiffs then and there duly excepted, which exception was by the Court allowed.

Thereafter Mr. Augustus Johnson testified, among other things, on direct examination, as follows, to-wit:

Q Now after this ship Mozambique arrived and a portion of the clay had been taken to the defendant's works at Everett, state if you please what the defendant did with the clay with reference to its use.

A The clay was landed at our wharf and stored in the yard in our usual clay storing place. We were short of clay. We were anxious for the arrival of the ship and immediately upon receiving a telegram from Mr. Tucker to the effect that the Mozambique had arrived we proceeded to bring the clay to the mill. There were a few broken casks; some broken casks and we started to use that first. It was discovered almost immediately that the color of the paper was down and we started to trace and it was found that it was the clay. Instructions were then given to discontinue the use of that clay. Mr. Tucker was advised and after a great deal of correspondence Mr. Tucker came to the mill.

Q I will now show you a letter dated October 15th, 1907, and ask you if that was a letter which you received from the Meyer, Wilson Company, signed by Mr. Tucker, in regard to this clay at that time. (Hands witness paper.)

A That is the letter.

MR. BROWNELL: We offer the letter in evidence as defendant's exhibit "5."

THE COURT: It may be admitted.

Defendant's exhibit "5" is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. "5."

Meyer, Wilson & Co.
Portland, Oregon.
Meyer, Wilson & Co.
San Francisco, Cal.
Wilson, Meyer & Co.
Liverpool.

Telegraphic Addresses:
"Meyer," Portland.
"Meyer," San Francisco.
"Rodgers," Liverpool.

Everett Pulp & Paper Co.,
RECEIVED
Oct. 17, 1907.
A.M. Ans'd. P.M.
7-8-9-10-11-12-1-2-3-4-5-6

Portland, Oregon, Oct. 15, 1907.

Messrs. The Everett Pulp & Paper Co.,
Everett, Wash.

Dear Sirs:

The samples of China clay ex "Mozambique" which you forwarded us, we immediately passed on to our San Francisco House and they in turn submitted these samples to experts, and they now report to us on same as follows: "To sum up the whole thing we may state that the China clay shipment ex 'Mozambique' is up to the original sample." In this connection we may tell you that when we sent you the sample of P. X. Y. China clay, upon which you purchased from 300-400 tons, we retained one-half of the sample here, and this we forwarded, with the others from yourselves, to our San Francisco House

so that they and experts have had every opportunity of studying this matter fully.

Regarding the different colors, it is stated that these are readily explained by the different degrees of moisture in the clay, and that when the clay is dried out the sample regains the original color; that samples taken from different parts of the same casks show slight differences in the color is accounted for by the fact that in the parts of the barrel more exposed to moisture the clay is darker, whereas, where less exposed it is lighter. Absolutely no sand has been found in any of the samples of the clay you furnished us, there being a total absence of grittiness, and therefore there can be no extraneous matter. The samples were submitted to a man of very considerable experience in San Francisco in China clays, and after thoroughly examining the samples he stated that there was neither sand nor grit in any of the samples, and further that the clay was all of one color, but that some had absorbed moisture of a more or less degree, which affected the color somewhat, but that it was quite evident to him that the samples were all the same clay and of the same color originally, which undoubtedly it would regain when dried.

You will, of course, recall that we sold you this shipment of clay not to be as per sample, but after submitting you sample of the P. X. Y. brand to show you the general quality of same we sold you 300-400 tons of the P. X. Y. brand. Throughout the world it is the custom, even if one sells as per sample, to sell only about as per sample, for none of these samples can be absolutely guaranteed, as is of course well known to you.

You are of course also aware that you had to take delivery of the China clay from alongside vessel as discharged in Seattle, and that it was your duty to have a representative at the ship to examine the clay and accept or decline the clay there on the wharf where discharged. We never agreed to allow the clay to be transshipped from Seattle to Everett to your works, and there accept or reject. The terms of our contract are very clear on this.

We have been hoping to hear of your Mr. Johnson's return from San Francisco and that he would call upon us when passing through Portland. We presume that he has not yet reached Everett and that we may expect a call from him any time, when we shall of course go over the matter very thoroughly with him, and it is quite possible that the writer may be in Seattle in the near future, when if it be deemed expedient he can run up to Everett.

Yours very truly,
PR. PRO. MEYER, WILSON & CO.,
Alfd. Tucker.

Q How were those casks marked, Mr. Johnson?

A Those casks were marked with a Diamond A, Great Britain.

Q Were they marked with the term P. X. Y?

A No sir.

Q Was there anything on the casks to designate P. X. Y?

A None whatever.

Q What was meant by the term P. X. Y. as used in this correspondence and in the contract which was executed?

A It simply referred to the samples of clay that had been submitted to us as being a sample of that particular brand that they had offered to us. We always buy clay on sample. We must do it. We request a sample and in making a purchase of clay samples are immediately submitted for a test to see if they suit our purposes.

Q Of this shipment what proportion was in accordance with this sample inspected by you as the P. X. Y. brand?

A Well that I can't say, Mr. Brownell, what proportion, because I left the mill in January after that. I went to San Francisco.

Q You then took charge of the San Francisco office?

A Yes sir.

Q And you had no further connection with this particular transaction?

A No.

MR. BROWNELL: That is all.

MR. HUNT: If your Honor please, I wish to move at this time that the testimony of Mr. Johnson from that period where he testifies to the taking of the clay from the dock to Everett, Washington, be stricken from the record because the contract provides that the purchasers are to take delivery of the China clay from alongside the vessel at once when discharged at Seattle, Washington. Mr. Johnson's testimony to the effect that they did take delivery, assuming their ownership and placing it where they desired it shows that they have taken delivery as well as acceptance. Whatever may have been done with the clay after it passed to their ownership and title is immaterial to the issues presented in this case.

Which motion to strike the Court denied, to which ruling the plaintiffs then and there duly excepted, which exception by the Court was then and there allowed.

Thereafter Alex Baillie, a witness on behalf of the defendants, after being first duly sworn, testified, among other things, on direct examination as follows:

Q Are you acquainted with the customs prevailing at the port of Seattle with respect to inspection and delivery and examination of China clay as it arrives on board ship?

MR. HUNT: Just a moment, if your Honor please. Evidently Mr. Baillie is going to testify under the allegations of the complaint that it is the custom and usage in the port of Seattle that China clay is not inspected at the time it is received upon the dock but inspected some other time. Now in the contract which was made between these parties I want to call your Honor's particular attention to this clause of the contract, "Net invoice weight ex ship at Seattle, Washington, purchasers to take delivery of China clay from alongside of vessel at once on discharge at Seattle, Washington." Now they are seeking to introduce evidence to vary that written contract, but the ruling of the Supreme Court, as well as the federal courts and as well as the supreme court of the State

of Washington, hold that evidence of a custom or usage will not be received to explain or vary the terms of a written contract. Neither will such evidence be received when the contract is plain upon its face and the parties have contracted in plain and unambiguous language.

MR. BROWNELL: If your Honor please, the point sought to be brought out by this testimony is in connection with the contract made between these parties as to what is meant by the term delivery.

The COURT: I will overrule the objection.

To which ruling the plaintiffs then and there duly excepted, which exception was then and there duly allowed by the Court.

Thereafter Mr. A. H. P. Jordan, a witness on behalf of the defendants, being first duly sworn, testified among other things on direct examination as follows:

Q Now then, with reference to the trade, the terms of purchase and sale of China clay; by the term "delivery" of China clay in the trade, particularly as the trade takes place here in the City of Seattle and State of Washington—what is meant?

To which question the plaintiffs objected as incompetent, irrelevant and immaterial, which objection was overruled by the Court, to which ruling the plaintiffs then and there duly excepted, which exception was by the Court then and there duly allowed.

Thereafter Mr. A. H. P. Jordan, being further examined, testified on direct examination as follows:

Q What effect would clay containing the percentage of grit like the sample rejected have upon the paper making machine?

A Well, it wears out what is called the cloth on the machine. The shape of paper is formed on an apron of wire, the cost of which is about $125 or $130 and a large percentage of grit running in the paper, the wire is endless and travels round and round forming the seat on top—that rapidly wears out this wire which instead of lasting as it should about twenty days it lasts six or eight. It also wears out the rolls on the machine and the wheels and the belts which carry the wet paper.

Q Did I ask you what sort of effect this had in the paper itself, besides increasing the cost of manufacturing?

MR. HUNT: If your Honor please, I object to this line of examination and what effect this clay may have upon the wheels or rolls or what kind of paper is produced. I can't see how it is material to the issues in this case.

Which objection was overruled by the Court, to which ruling the plaintiffs then and there excepted, which exception was then and there duly allowed by the Court.

Thereafter Mr. A. H. P. Jordan, in his re-direct examination, among other things testified as follows:

Q I will show you two photographs and I will ask you if this is a photograph of the place?

A That is the way we store our clay, yes.

Q That is not of this particular shipment, this photograph, is it?

A No, that is what we have now. This is a shipment of clay in the yard.

Q For your own use?

A Yes.

Q It is not the shipment in dispute?

A No.

MR. BROWNELL: We introduce that in evidence.

MR. HUNT: I wish to object to the introduction of that photograph. I see no competency in it. It is a picture of clay in their yard now—a subsequent shipment. I can see no relevancy to the issues of the case from that picture.

Which objection was by the Court overruled, to which ruling the plaintiffs then and there duly excepted, which exception was then and there duly allowed by the Court.

Thereafter Mr. William Howarth, a witness on behalf of the defendant, being recalled, testified on his direct examination as follows:

Q By the term "delivery" in the trade and in these contracts that are made, what is the usual understanding or what

is the understanding in the trade as compared with acceptance or examination?

To which question the plaintiffs objected, which objection was overruled by the Court, to which ruling the plaintiffs then and there duly excepted, which exception was then and there allowed by the Court.

Thereafter, when the plaintiffs had rested and the defendant had rested and the case was closed as to the giving any further evidence, the plaintiffs then moved the Court for judgment on the pleadings, and also for verdict and judgment upon the case, and in support of said motions the following reasons were assigned:

1. That the defendant had pleaded in its answer and its evidence proved that it had accepted 861 casks of the clay, which conformed to the sample submitted, and that it had rejected 606 casks, which were alleged to be inferior to the said sample. That under the pleadings and the evidence and where a contract for the sale of personal property is entire the defendant will not be allowed to accept performance of a part of said contract and reject performance of another part.

2. That under and by the pleadings the defendant has not counterclaimed for any damages sustained by reason of the alleged breach of warranty and hence none can be allowed to it

Which motions were overruled by the Court. The plaintiffs then and there duly excepted to the said ruling, which exception was then and there duly allowed by the Court.

Thereafter the Court in its written opinion made a finding of law which is as follows:

"The defendant acted within its legal rights in taking possession of the clay and resisting the plaintiffs' demand for the price of the portion inferior to the sample. In this country the rule is well established by numerous decisions of the courts that a breach of an implied warranty of quality entitles the vendee to retain the goods and when sued for the purchase price to set up the breach of warranty to reduce the sum recoverable by the vendor. The measure of damages which the vendee may

claim for breach of an implied warranty of quality is the difference between the actual value of the property delivered and the higher value of the warranted quality, and if there is no other evidence of value the price agreed to be paid will be regarded as the value of the property of the quality warranted.

In this case the defendant having offered to return the inferior clay and to hold it subject to disposition by the plaintiffs, the contract price is the measure of damages which it is entitled to recoup."

That said finding is contrary to the evidence, which is as follows:

Mr. W. J. Pilz being recalled on behalf of the plaintiffs, in rebuttal, testified as follows:

Q (By Mr. Hunt) Did you sell a part of the clay remaining in the yard—of the rejected clay?

A I made arrangements to sell it.

Q How much did you sell?

A About nine tons.

Q What was the price which you received?

A Part of the clay I think sold for $17 a ton of 2000 pounds at the mill. I think one shipment I sold for $15, as it was a sample shipment for a carload.

Q (By Mr. Brownell): State that in pounds, because the contract is in pounds.

A $17 would be 85 cents a hundred pounds.

Q 85 cents a pound?

A No, 85 cents a hundred pounds. $17 a ton.

The finding of the Court was objected to, which objection was overruled by the Court, to which ruling the plaintiffs duly excepted, which exception was duly allowed by the Court.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
Counsel for Plaintiffs.

United States of America,
Western District of Washington.—ss.

This certifies that on this 7th day of June, 1911, the plaintiffs herein, by Williams, Wood & Linthicum and Isaac D. Hunt, their attorneys, presented to the Court the foregoing eighteen pages of typewritten matter as and for their bill of exceptions in the above entitled case, and the defendants having been duly served with a copy thereof and having made no objection thereto, and the Court having examined the same and being fully satisfied in the premises, the foregoing is allowed and settled as the bill of exceptions for the plaintiffs, and each of them, duly stating those exceptions taken by the plaintiffs to the ruling of the Court during the said trial, together with sufficient of the testimony to explain the same.

C. H. HANFORD, Judge.

Due service of the proposed bill of exceptions accepted this 5th day of June, 1911.

J. A. COLEMAN,
Attorney for Defendant.

Indorsed: Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, June 7, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, plaintiffs in the above entitled cause, feeling themselves aggrieved by the judgment of the above entitled court entered the ..... day of April, 1911, come now by Williams, Wood & Linthicum and Isaac D. Hunt, their attorneys, and petition said Court for an order allowing said plaintiffs to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
Attorneys for Plaintiffs.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

ASSIGNMENTS OF ERROR.

Come now the plaintiffs and file the within assignments of error upon which they and each of them will rely upon in their prosecution of the writ of error in the above entitled cause.

1.

That the United States Circuit Court in and for the Western District of Washington, Northern Division, erred in overruling the objection of counsel for plaintiffs in error to the introduction of evidence at the trial of said cause of the letter being marked defendant's exhibit No. "1." That the said letter is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. "1."

Meyer, Wilson & Co.,
Portland, Oregon.
Meyer, Wilson & Co.,
San Francisco, Cal.
Wilson, Meyer & Co.,
Liverpool.

Telegraphic Addresses:
"Meyer," Portland.
"Meyer," San Francisco.
"Rodgers," Liverpool.

RECEIVED
Oct. 1, 1906.
Everett Pulp & Paper Co.

ANSWERED
Oct. 1, 1906.
Wm. Howarth.

Portland, Oregon,
Sept. 29, 1906.
Saturday.

Messrs. Everett Pulp & Paper Co.,
Everett, Wash.

Dear Sirs:

Referring to the correspondence we had heretofore with you regarding China clay, we now have the pleasure of advising you that we send you under separate cover a sample marked "P. X. Y." of an English China clay, which the makers believe matches your own sample very well, and we trust that you will find it so. It is probable that we could work your order for a quantity of not less than 400 to 500 tons of this P. X. Y. China clay in one-half ton casks with extra iron hoops, which packages have in our previous shipments proved very satisfactory, indeed, at the price of 76½ cents per 100 lbs. ex ship at Seattle; wharfage, if any, on the goods for buyers account, as usual. Will you kindly let us know whether you are inclined to place an order with us on this basis. We have not a vessel at the present time, but our efforts are towards securing such a ship for Puget Sound. We have actually secured a vessel for the same business for Portland, Oregon, but this, of course, does not help

us in any transaction with you. Sailing vessels are somehow becoming scarcer and scarcer for this destination, as owners seem to prefer to send their craft in other directions, therefore, we would suggest that it would be well to place your order with us subject to cable reply in, say a week or even a fortnight, so as to give our Liverpool House a fair chance to work up the business, and in conjunction with the same, the balance of the cargo.

We may say that freights are quite high at present, but they are also very likely to remain so for many months to come, as the demand for building material at San Francisco, and also for Valparaiso has the tendency to stiffen the freight market.

One reason why we are approaching you at the present time is that we have other cargo for Puget Sound in sight, and various business has to be worked up in conjunction with the China clay to complete the transaction. We may say, when we report that the casks we use have given satisfaction, that we have a number of shipments delivered here to go by, and we have given this matter of securing a satisfactory package for China clay very considerable attention, so that it has happened repeatedly that we have delivered China clay in excellent order and condition when others received their shipments practically in bulk.

Hoping to hear from you, we are, dear sires,

Yours very truly,

MEYER, WILSON & CO.

"If you elect to place an offer with us, we shall immediately cable same to our Liverpool House, who will then work on the matter at once and try to bring it to completion as quickly as possible.

M. W. & CO.

2.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the introduction of evidence

at the trial of said cause of a sample of clay, the same being marked defendant's exhibit "2."

3.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the introduction of evidence at the trial of said cause of a letter written by the defendant to the plaintiff under date of October 11, 1906, said letter being marked defendant's exhibit "3" and is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. "3."

October 11-06.

Mr. Alfred Tucker,
c/o P. J. Fransioli & Co.,
Seattle, Wash.

Dear Sir:

Confirming the writer's telephonic communication to you today; please enter our order for 3/400 tons of P. X. Y. China clay, to be fully equal to the sample which you have submitted to us, at the price quoted by you, viz: 70c per 100 lbs., ex ship at Seattle, duty paid.

It is understood that this is to be packed in 5-cwt. casks reinforced with iron hoops, and is for November/December shipment.

Kindly send us your confirmation of this.

This being our initial order with you, we sincerely hope that everything will come out satisfactorily, and that a nice business will result.

Yours truly,

Secretary.

4.

That the said Court erred in overruling the objection of

counsel for plaintiffs in error to the following question asked of the witness, Augustus Johnson:

Q. "You say you made this examination. What is the use to which clay is placed in the paper business and why is it necessary for you to examine the color and percentage of grit?" to which question counsel for plaintiffs in error objected, which objection was overruled by the Court, to which ruling the plaintiff then and there duly excepted, which exception was allowed by the Court. In answer to the question witness responded as follows:

A. "Clay is used as a filler in the paper manufacture in order to close the pores between the fibres. The percentage of grit is the important feature for the reason that if it contains a large percentage of grit it will show up and make the paper spotty; the paper therefore becomes unmerchantable. A printer cannot use it for the reason that it wears out his type.

Q Does it have any effect upon the use for writing paper, upon the pen?

A It does. The pen will scratch. It is very unsatisfactory for that. Further in the case of grit, in clay, it wears out the wires on the paper machines.

Q What effect does the wearing out of the wire have upon increasing the cost to the manufacturer?

A A great deal of effect. Further, it must have a white color in order to produce a white sheet of printing paper."

5.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the introduction of evidence at the trial of said cause of a letter dated October 15, 1907, written by the plaintiffs in error to the defendant, which said letter is marked defendant's exhibit "5" and is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. "5."

Meyer, Wilson & Co.
Portland, Oregon.
Meyer, Wilson & Co.,
San Francisco, Cal.
Wilson, Meyer & Co.,
Liverpool.

Telegraphic Addresses:
"Meyer," Portland,
"Meyer," San Francisco.
"Rodgers," Liverpool.

Everett Pulp & Paper Co.,
RECEIVED
Oct. 17, 1907.
A.M. Ans'd. P.M.
7-8-9-10-11-12-1-2-3-4-5-6.

Portland, Oregon, Oct. 15, 1907.

Messrs. The Everett Pulp & Paper Co.,
Everett, Wash.

Dear Sirs:

The samples of China clay ex "Mozambique" which you forwarded us, we immediately passed on to our San Francisco House and they in turn submitted these samples to experts, and they now report to us on same as follows: "To sum up the whole thing we may state that the China clay shipment ex 'Mozambique' is up to the original sample." In this connection we may tell you that when we sent you the sample of P. X. Y. China clay, upon which you purchased from 300-400 tons, we retained one-half of the sample here, and this we forwarded, with the others from yourselves, to our San Francisco House so that they and experts have had every opportunity of studying this matter fully.

Regarding the different colors, it is stated that these are readily explained by the different degrees of moisture in the clay, and that when the clay is dried out the sample regains the original color; that samples taken from different parts of

the same casks show slight differences in the color is accounted for by the fact that in the parts of the barrel more exposed to moisture the clay is darker, whereas, where less exposed it is lighter. Absolutely no sand has been found in any of the samples of the clay you furnished us, there being a total absence of grittiness, and therefore there can be no extraneous matter. The samples were submitted to a man of very considerable experience in San Francisco in China clays, and after thoroughly examining the samples he stated that there was neither sand nor grit in any of the samples, and further that the clay was all of one color, but that some had absorbed moisture of a more or less degree, which affected the color somewhat, but that it was quite evident to him that the samples were all the same clay and of the same color originally, which undoubtedly it would regain when dried.

You will, of course, recall that we sold you this shipment of clay not to be as per sample, but after submitting you sample of the P. X. Y. brand to show you the general quality of same we sold you 300-400 tons of the P. X. Y. brand. Throughout the world it is the custom, even if one sells as per sample, to sell only about as per sample, for none of these samples can be absolutely guaranteed, as is of course well known to you.

You are of course also aware that you had to take delivery of the China clay from alongside vessel as discharged in Seattle, and that it was your duty to have a representative at the ship to examine the clay and accept or decline the clay there on the wharf where discharged. We never agreed to allow the clay to be transshipped from Seattle to Everett to your works, and there accept or reject. The terms of our contract are very clear on this.

We have been hoping to hear of your Mr. Johnson's return from San Francisco and that he would call upon us when passing through Portland. We presume that he has not yet reached Everett and that we may expect a call from him any time, when we shall of course go over the matter very thoroughly with him, and it is quite possible that the writer may be in Seattle in the

near future, when if it be deemed expedient he can run up to Everett.

Yours very truly,
PR. PRO. MEYER, WILSON & CO.,
Alfd. Tucker.

6.

That the said Court erred in overruling the motion by counsel for plaintiffs in error to strike from the record the following testimony given and offered by Augustus Johnson:

Q Now after this ship Mozambique arrived and a portion of the clay had been taken to the defendant's works at Everett, state if you please what the defendant did with the clay with reference to its use.

A The clay was landed at our wharf and stored in the yard in our usual clay storing place. We were short of clay. We were anxious for the arrival of the ship and immediately upon receiving a telegram from Mr. Tucker to the effect that the Mozambique had arrived we proceeded to bring the clay to the mill. There were a few broken casks; some broken casks and we started to use that first. It was discovered almost immediately that the color of the paper was down and we started to trace and it was found that it was the clay. Instructions were then given to discontinue the use of that clay. Mr. Tucker was advised and after a great deal of correspondence Mr. Tucker came to the mill.

Q I will now show you a letter dated October 15th, 1907, and ask you if that was a letter which you received from the Meyer, Wilson Company, signed by Mr. Tucker, in regard to this clay at that time. (Hands witness paper.)

A That is the letter.

MR. BROWNELL: We offer the letter in evidence as defendant's exhibit "5."

THE COURT: It may be admitted.

Defendant's exhibit "5" is in words and figures as follows, to-wit:

DEFENDANT'S EXHIBIT NO. 5.

Meyer, Wilson & Co.,
Portland, Oregon.
Meyer, Wilson & Co.,
San Francisco, Cal.
Wilson, Meyer & Co.,
Liverpool.

Telegraphic Addresses:
"Meyer," Portland.
"Meyer, San Francisco.
"Rodgers," Liverpool.

Everett Pulp & Paper Co.,
RECEIVED
Oct. 17, 1907.
A.M. Ans'd. P.M.
7-8-9-10-11-12-1-2-3-4-5-6

Portland, Oregon, Oct. 15, 1907.

Messrs. The Everett Pulp & Paper Co.,
Everett, Wash.

Dear Sirs:

The samples of China clay ex "Mozambique" which you forwarded us, we immediately passed on to our San Francisco House and they in turn submitted these samples to experts, and they now report to us on same as follows: "To sum up the whole thing we may state that the China clay shipment ex 'Mozambique' is up to the original sample." In this connection we may tell you that when we sent you the sample of P. X. Y. China clay, upon which you purchased from 300-400 tons, we retained one-half of the sample here, and this we forwarded, with the others from yourselves, to our San Francisco House so that they and experts have had every opportunity of studying this matter fully.

Regarding the different colors, it is stated that these are readily explained by the different degrees of moisture in the clay, and that when the clay is dried out the sample regains the original color; that samples taken from different parts of

the same casks show slight differences in the color is accounted for by the fact that in the parts of the barrel more exposed to moisture the clay is darker, whereas, where less exposed it is lighter. Absolutely no sand has been found in any of the samples of the clay you furnished us, there being a total absence of grittiness, and therefore there can be no extraneous matter. The samples were submitted to a man of very considerable experience in San Francisco in China clays, and after thoroughly examining the samples he stated that there was neither sand nor grit in any of the samples, and further that the clay was all of one color, but that some had absorbed moisture of a more or less degree, which affected the color somewhat, but that it was quite evident to him that the samples were all the same clay and of the same color originally, which undoubtedly it would regain when dried.

You will, of course recall that we sold you this shipment of clay not to be as per sample, but after submitting you sample of the P. X. Y. brand to show you the general quality of same we sold you 300-400 tons of the P. X. Y. brand. Throughout the world it is the custom, even if one sells as per sample, to sell only about as per sample, for none of these samples can be absolutely guaranteed, as is of course well known to you.

You are of course also aware that you had to take delivery of the China clay from alongside vessel as discharged in Seattle, and that it was your duty to have a representative at the ship to examine the clay and accept or decline the clay there on the wharf where discharged. We never agreed to allow the clay to be transshipped from Seattle to Everett to your works, and there accept or reject. The terms of our contract are very clear on this.

We have been hoping to hear of your Mr. Johnson's return from San Francisco and that he would call upon us when passing through Portland. We presume that he has not yet reached Everett and that we may expect a call from him any time, when we shall of course go over the matter very thoroughly with him, and it is quite possible that the writer may be in Seattle in the

near future, when if it be deemed expedient he can run up to Everett.

Yours very truly,
PR. PRO. MEYER, WILSON & CO.,
Alfd. Tucker.

Q How were those casks marked, Mr. Johnson?

A Thoses casks were marked with a Diamond A. Great Britain.

Q Were they marked with the term P. X. Y?

A No sir.

Q Was there anything on the casks to designate P. X. Y?

A None whatever.

Q What was meant by the term P. X. Y. as used in this correspondence and in the contract which was executed?

A It simply referred to the samples of clay that had been submitted to us as being a sample of that particular brand that they had offered to us. We always buy clay on sample. We must do it. We request a sample and in making a purchase of clay samples are immediately submitted for a test to see if they suit our purposes.

Q Of this shipment what proportion was in accordance with this sample inspected by you as the P. X. Y. brand?

A Well that I can't say, Mr. Brownell, what proportion, because I left the mill in January after that. I went to San Francisco.

Q You then took charge of the San Francisco office?

A Yes sir.

Q And you had no further connection with this particular transaction?

A No.

MR. BROWNELL: That is all.

Counsel for plaintiffs in error moved the Court to strike the testimony of Mr. Johnson from the record on the ground and for the reason that the contract entered into between the parties and introduced in evidence showed that the clay was to

be taken from alongside the vessel at once upon discharge at Seattle, Washington, the testimony of witness being to the effect that the clay was not to be accepted from place mentioned in said contract and furthermore the testimony of witness showed that it did take delivery at such place, assume ownership and dispose of same according to the defendant's wishes, which evidence of the disposing of the clay after accepting the same was immaterial to any issues presented in this cause. Which motion to strike the Court denied, to which ruling the plaintiffs then and there duly excepted, which exception by the Court was then and there allowed.

7.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the following question asked of the witness, Alex. Baillie:

Q "Are you acquainted with the customs prevailing at the port of Seattle with respect to inspection and delivery and examination of China clay as it arrives on board ship?" which objection was by the Court overruled and an exception duly allowed to the plaintiffs in error to which question in answer thereof the following testimony was given by Alex Baillie:

A "I am."

Q State now if you please what is meant by the term "Delivery ex ship," or alongside ship on the dock at Seattle, as distinguished from examination and inspection of the quality or class, if there is such a distinction, in the trade.

MR. HUNT: If your Honor please I wish it to be understood that my objection goes to this whole line of testimony.

THE COURT: Yes, you can have your exception.

A Well, acceptance of delivery is considered simply the condition of the packages.

Q I beg your pardon?

A The condition of the packages.

Q Well if it is casks what does it mean. By packages you mean casks?

A Yes, or bags or boxes or anything.

Q In the China clay trade, would it be possible to ascertain the character of China clay as to being of a certain brand or not, alongside of the ship?

A I should think not.

Q I call your attention now to defendant's exhibit "1," being the contract in this case in which the words occur, "Net invoice weight ex ship at Seattle, Washington," also, "Purchaser to take delivery of China clay from alongside of vessel at once on discharge at Seattle," and ask you if in the trade the language of that contract would mean that an inspection to determine the class and character of the clay must be made alongside of the ship, or if any inspection should be made alongside of the ship other than to determine whether any of the casks were broken or not?

A I don't see how the quality could be determined alongside ship.

Q In your business would the word "Delivery," used in a contract like that, he held to include an inspection and examination of the class and character of the contents?

MR. HUNT: I object to that question. Mr. Baillie's business may not be pertinent in this case.

Q Well in the trade as you have carried it on; in the China clay trade as you have carried it on?

A No.

8.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the following question asked of the witness, A. H. P. Jordon:

Q "Now then, with reference to the trade, the terms of purchase and sale of China clay; by the term 'delivery' of China clay in the trade, particularly as the trade takes place here in the City of Seattle and State of Washington—what is meant?" which objection of counsel for plaintiffs in error was overruled by the Court and the exception duly allowed; to which question the witness responded as follows:

"A Why the clay that we have bought for delivery—it means the taking of the clay at the ship's side.

Q Is it possible at the ship's side to make a test, as to the character and quality of the clay which you have described; commercially possible?

A No.

9.

That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness, A. H. P. Jordon:

Q "What effect would clay containing the percentage of grit like the sample rejected have upon the paper making machine?" which objection the Court overruled, the plaintiffs in error being allowed an exception. The answer of the said witness to the said question is as follows:

A "Well, it wears out what is called the cloth on the machine. The shape of the paper is formed on an apron of wire, the cost of which is about $125 or $130 and a large percentage of grit running in the paper, the wire is endless and travels round and round forming the sheet on top—that rapidly wears out this wire which instead of lasting as it should about twenty days it lasts six or eight. It also wears out the rolls on the machine and the wheels and the belts which carry the wet paper.

10.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the following question asked of witness, A. H. P. Jordon:

Q "Did I ask you what sort of effect this had in the paper itself, besides increasing the cost of manufacturing?" which objection said Court overruled and duly allowed the plaintiffs in error an exception; to which question the witness replied:

A "Well this clay we rejected, we simply couldn't use it in the manufacture of our grade of paper."

11.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to a photograph of a shipment of clay placed in the storage yard of the defendant, which objection was overruled by the Court and an exception duly allowed the plaintiffs in error.

12.

That the said Court erred in overruling the objection of counsel for plaintiffs in error to the following question asked of the witness, William Howarth:

Q "By the term 'delivery' in the trade and in these contracts that are made, what is the usual understanding or what is the understanding in the trade as compared with acceptance or examination?" to the overruling of which objection counsel for plaintiffs in error excepted, which exception was duly allowed. In reply to the above question witness replied as follows:

A "My understanding is that any apparent defects which can be discovered at the ship's side must be complained of at that time so that the rights of the shippers have not been stopped as against the ship, if there has been any apparent damage caused en route. As far as examination of enclosed packages such as clay, where the defects are not latent, and where it needs considerable time and skill to make the examinations, then the goods have always been permitted to go up to the mill, even after the defects have been found, and this is the first instance that we have been advised that we have taken delivery and that we have, by not rejecting the shipmnt at the ship's side, accepted the shipment, and we must pay for it whether it contains another thing than what we contracted for.

13.

That the said Court erred in overruling and denying the motion made by counsel for plaintiffs in error at the close of the testimony, for judgment on the pleadings, and also for verdict and judgment upon the case upon the following grounds:

1. That the defendant had pleaded in its answer and its evidence proved that it had accepted 861 casks of the clay, which conformed to the sample submitted, and that it had rejected 606 casks, which were alleged to be inferior to the said sample. That under the pleadings and the evidence and where a contract for the sale of personal property is entire the defendant will not be allowed to accept performance of a part of said contract and reject performance of another part.

2. That under and by the pleadings the defendant has not counterclaimed for any damages sustained by reason of the alleged breach of warranty and hence none can be allowed to it.

14.

That the said Court erred in making the following finding:

"The defendant acted within its legal rights in taking possession of the clay and resisting the plaintiff's demand for the price of the portion inferior to the sample. In this country the rule is well established by numerous decisions of the courts that a breach of an implied warranty of quality entitles the vendee to retain the goods and when sued for the purchase price to set up the breach of warranty to reduce the sum recoverable by the vendor. The measure of damages which the vendee may claim for breach of an implied warranty of quality is the difference between the actual value of the property delivered and the higher value of the warranted quality, and if there is no other evidence of value the price agreed to be paid will be regarded as the value of the property of the quality warranted.

In this case the defendant having offered to return the inferior clay and to hold it subject to disposition by the plaintiffs, the contract price is the measure of damages which it is entitled to recoup."

That said finding is contrary to the evidence which is given by Mr. W. J. Pilz and which is as follows:

"Q (By Mr. Hunt): Did you sell a part of the clay remaining in the yard—of the rejected clay?

A I made arrangements to sell it.

Q How much did you sell?

A About nine tons.

Q What was the price which you received?

A Part of the clay I think sold for $17 a ton of 2000 pounds at the mill. I think one shipment I sold for $15, as it was a sample shipment for a carload.

Q (By Mr. Brownell): State that in pounds, because the contract is in pounds.

A $17 would be 85 cents a hundred pounds.

Q 85 cents a pound?

A No, 85 cents a hundred pounds. $17 a ton.

Wherefore, the plaintiffs in error pray that the judgment of the Circuit Court of the United States for the Western District of Washington, Northern Division, be reversed.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
Attorneys for Plaintiffs in Error.

Indorsed: Petition for and Assignment of Errors. Filed U. S. Circuit Court, Western District of Washington, June 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

ORDER ALLOWING WRIT OF ERROR.

This 29th day of June, A. D. 1911, came the plaintiffs by their attorney and filed herein and presented to the Court their petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that the transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiffs giving bond according to law, in the sum of three hundred (300) dollars which shall operate as a supersedeas bond.

C. H. HANFORD,
Judge of the Above Entitled Court.

Indorsed: Order Allowing Writ of Error. Filed U. S. Circuit Court, Western District of Washington, June 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs.*

vs.

EVERETT PULP & PAPER COMPANY, *Defendant.*

No. 1641.

Know All Men by These Presents:

That we, H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer, Wilson & Company, and T. A. Fransioli and Geo. J. Danz, are held and firmly bound unto the Everett Pulp & Paper Company in the sum of Three Hundred Dollars ($300.00) to be paid to the said Everett Pulp & Paper Company or its assigns. To which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this 3rd day of June, 1911.

Whereas, the above named H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer, Wilson & Company, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the Western District of Washington, Northern Division.

Now therefore the condition of this obligation is such that

if the above named H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer, Wilson & Company, shall prosecute said appeal to effect, and answer all costs entered against them, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing busines as
MEYER, WILSON & COMPANY,
By ALFRED TUCKER, (Seal)
Manager.
T. A. FRANSIOLI. (Seal)
GEO. J. DANZ. (Seal)

Signed, sealed and delivered in the presence of:

H. E. HANGER.
JOSEPH E. THOMAS.

United States of America,
Western District of Washington, Northern Division.—ss.

I, T. A. Fransioli, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident within said district; that I am worth in property situated therein the sum of Six Hundred Dollars ($600.00), over and above all my just debts and liabilities, exclusive of property exempt from execution.

T. A. FRANSIOLI.

Subscribed and sworn to before me this 3rd day of June, 1911.

(Notarial Seal Affixed) JOSEPH E. THOMAS,
Notary Public for Washington.

United States of America,
Western District of Washington, Northern Division.—ss.

I, Geo. J. Danz, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident within said district; that I am worth in property situated therein the sum of Six Hundred Dollars ($600.00) over and above all my just debts and liabilities, exclusive of property exempt from execution.

GEO. J. DANZ,

Subscribed and sworn to before me this 3rd day of June, 1911.

(Notarial Seal Affixed) JOSEPH E. THOMAS,
Notary Public for Washington.

Approved June 29, 1911.

C. H. HANFORD, Judge.

Indorsed: Appeal Bond. Filed U. S. Circuit Court, Western District of Washington, June 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court of Appeals for the Ninth Judicial District.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit.—ss.

The President of the United States to the Honorable Judge of the Circuit Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because of the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson, and John M. Quaile, partners doing business as Meyer, Wilson & Company, plaintiffs, and Everett Pulp & Paper Company, defendant, a manifest error hath happened, to the great damage of the said H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer, Wilson & Company, plaintiffs, as by their complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-

ment be there given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at San Francisco in said circuit, on the 28th day of July next in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States this 29th day of June, A. D. 1911, and of the one hundred thirty-fifth year of the independence of the United States of America.

SAM'L D. BRIDGES,
Clerk of the United States Circuit Court for the Western District of Washington.
(Seal) B. O. WRIGHT, Deputy.

Allowed by C. H. Hanford, United States District Judge for the Western District of Washington, Northern Division.

We hereby accept due personal service of the within Writ of Error on behalf of Everett Pulp & Paper Company, Defendant in Error, this 6th day of July, 1911.

J. A. COLEMAN,
Attorney for Defendant in Error.

Indorsed: No. 1641. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners doing business as Meyer, Wilson & Company, Plaintiffs, vs. Everett Pulp & Paper Company, Defendant. Writ of Error. Filed U. S. Circuit Court, Western District of Washington, July 8, 1911. Sam'l D. Bridges, Clerk. B. O. Wright Deputy. Peters & Powell, Williams, Wood & Linthicum, Attys. for Pltf., 546 N. Y. Blk., Seattle, Wn.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

CITATION ON WRIT OF ERROR.

United States of America,
Western District of Washington, Northern Division.—ss.

To the Everett Pulp & Paper Company and Francis H. Brownell and J. A. Coleman, Attorneys for Everett Pulp & Paper Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, plaintiffs, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Seattle in said District this 29th

day of June, in the year of our Lord, one thousand nine hundred and eleven.

(Seal) C. H. HANFORD, Judge.

Indorsed: Original—No. 1641, In the Circuit Court of the United States, Western District of Washington, Northern Division. H. L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., John Wedderburn Wilson and John M. Quaile, partners as Meyer, Wilson & Company, Plaintiffs, vs. Everett Pulp & Paper Company, Defendant. Citation on Writ of Error. Filed U. S. Circuit Court Western District of Washington, July 8, 1911. Sam'l D. Bridges, Clerk. D. O. Wright, Deputy. Peters & Powell, Williams, Wood & Linthicum, Attorneys for Plaintiffs, 546-551 New York Building, Seattle, Washington.

Service of within Citation and receipt of copy thereof admitted this 6th day of July, 1911.

J. A. COLEMAN,
Attorney for Defendant.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY,
Plaintiffs,

vs.

EVERETT PULP & PAPER COMPANY,
Defendant.

No. 1641.

ORDER EXTENDING TIME ON TRANSCRIPT.

Now on this 12th day of July, 1911, upon application and consent of counsel, and for sufficient cause appearing, it is by me ordered that the time within which the Clerk of this Court shall prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit the transcript of the record on appeal in this cause, be and the same is hereby extended to and including the 29th day of August, 1911.

Done in open Court this 12th day of July, 1911.

C. H. HANFORD, Judge.

Indorsed: Order Extending Time on Transcript. Filed U. S. Circuit Court, Western District of Washington, Jul. 12, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs,*

vs.

EVERETT PULP & PAPER COMPANY, *Defendant.*

No. 1641.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

Please certify and forward to the United States Circuit Court of Appeals for the Ninth Circuit, transcript on writ of error in the above entitled cause as follows:

Praecipe for our appearance.
Complaint.
Praecipe for appearance of defendant's attorneys.
Answer to complaint.
Reply to answer.
Petition for leave to amend reply and affidavit.
Order allowing amended reply to answer.
Amended reply to answer.
Opinion of Judge Hanford.
Judgment.
Stipulation No. 1.
Stipulation No. 2.
Bill of Exceptions.
Order allowing Bill of Exceptions.

Petition for Writ of Error.

Assignments of error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Writ of Error and admission of service thereof.

Citation on Writ of Error and admission of service thereof and this praecipe.

Order extending time to file transcript.

WILLIAMS, WOOD & LINTHICUM,
PETERS & POWELL,
Attorneys for Plaintiffs.

Indorsed: Praecipe for Transcript of Record. Filed U. S. Circuit Court, Western Division of Washington, June 14, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON AND JOHN M. QUAILE, partners doing business as MEYER, WILSON & COMPANY, *Plaintiffs in Error,* vs. EVERETT PULP & PAPER COMPANY, *Defendant in Error.*	No. 1641.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, SAM'L D. BRIDGES, Clerk of the Circuit Court of the United States, for the Western District of Washington, do hereby certify the foregoing 78 printed pages, numbered from 1 to 78, inclusive, to be a full, true and correct copy of so much of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of Attorneys for Plaintiffs in Error, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed Writ of Error.

I further certify that I annex hereto and herewith transmit the Original Writ of Error and Citation.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of $106.45.

and that the said sum has been paid to me by Messrs. Williams, Wood & Linthicum, Attorneys for Plaintiffs in Error,

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said District, this 16th day of August, A. D. 1911.

SAM'L D. BRIDGES, Clerk.
By B. O. WRIGHT,
Deputy Clerk.

No. 2023

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, Partners doing business as MEYER, WILSON & COMPANY,

PLAINTIFFS IN ERROR

vs.

EVERETT PULP & PAPER COMPANY,

DEFENDANT IN ERROR

Brief on Behalf of Plaintiffs in Error

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

WILLIAMS, WOOD & LINTHICUM
ISAAC D. HUNT
Attorneys for Plaintiffs in Error

PETERS & POWELL
Associate Counsel

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND, OREGON

No. 2023

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, Partners, Doing Business as MEYER, WILSON & COMPANY,

Plaintiffs in Error,

v.

EVERETT PULP & PAPER COMPANY,

Defendant in Error.

Brief on Behalf of Plaintiffs in Error

STATEMENT OF CASE

In making a statement of this case the appellant will set forth the pleadings upon which the issues were tried as comprising a clearer and more concise statement than could be made otherwise.

On the 20th day of January, 1908, the above named plaintiffs filed a complaint in the Circuit Court of the United States for the Western District of Washington, Northern Division, which is in words and figures as follows, to-wit:

(TITLE.)

The above named plaintiffs, for cause of action against the above named defendant, allege as follows:

I.

"At all the times hereinafter set forth the plaintiffs, "H. L. E. Meyer, George H. C. Meyer and H. L. E. Meyer, "Jr., were and still are citizens of the State of California, "and residents and inhabitants thereof; and plaintiffs, "John Wedderburn Wilson and John M. Quaile, were and "still are subjects of His Majesty, the King of Great "Britain and Ireland, and were and still are citizens of the "Kingdom of Great Britain and Ireland and residents and "inhabitants thereof; and all of the plaintiffs were and "still are partners doing business as Meyer, Wilson & "Company.

II.

"At all the times hereinafter set forth the defendants, "Everett Pulp & Paper Company, was and still is a corpo- "ration organized and existing under and by virtue of the "laws of the State of Washington, and at all of such times "said defendant was and still is a citizen of the State of "Washington and a resident and inhabitant thereof.

III.

"The amount in controversy herein, exclusive of inter- "est and costs, exceeds the sum of two thousand dollars "($2,000), and is, to-wit, the sum of six thousand two "hundred and seventy-two dollars.

IV.

"Heretofore, and on the 15th day of October, 1906, "plaintiffs and defendants entered into a certain contract "in writing wherein and whereby the plaintiffs agreed to "sell to the defendant, and the defendant agreed to pur-

"chase from the plaintiffs about three hundred (300) to "four hundred (400) tons of twenty-two hundred and "forty (2240) pounds each of China clay in casks, of the "brand known as the P. X. Y. brand, at the rate of seventy "(70) cents per one hundred (100) pounds, net invoice "weight, ex ship at Seattle, Washington.

"Such sale was made for shipment per the ship Mozam- "bique from Leith, Scotland, or Tyne, England, to Seattle. "Delivery was to be taken by the purchaser from along- "side the vessel at once on discharge at Seattle, Washing- "ton; such clay to be at the risk of purchasers, and wharf- "age, if any, at Seattle, Washington, to be for the account "of the purchaser.

"Pursuant to said contract, the plaintiffs delivered on "board the said ship Mozambique at Newcastle-on-the- "Tyne, England, sixteen hundred (1600) casks of China "clay of the P. X. Y. brand, the gross weight of which was "four hundred and twenty-five tons, containing nine hun- "dred and fifty-two thousand (952,000) pounds, and the "tare on which barrels was twenty-five tons, containing "fifty-six thousand (56,000) pounds, making the total net "weight four hundred (400) tons, containing eight hun- "dred and ninety-six thousand (896,000) pounds; all as "shown by the invoice weights thereof as paid for by plain- "tiffs to the sellers to them of such clay.

"Thereafter said ship Mozambique sailed upon her voy- "age from Newcastle-on-the-Tyne to Seattle, and there- "after, and prior to the 12th day of October, 1907, dis- "charged at the dock of Galbraith-Bacon Company at "Seattle, Washington, said China clay so shipped as afore- "said; and the defendant, pursuant to said contract, took "delivery of said clay from alongside said ship and ex said "ship at Seattle, Washington.

"The contract price for said clay, so sold and delivered "by plaintiffs to defendant, was the sum of sixty-two hun- "dred and seventy-two dollars ($6272), no part of which "has been paid, although long past due and payable. The

"terms of said sale were cash ex ship at Seattle, demand "has been made by plaintiffs upon the defendant for the "payment of said amount, but it refuses to pay the same "or any part thereof.

"Wherefore, plaintiffs demand judgment against the "defendant for the sum of sixty-two hundred and seventy-"two dollars ($6272) with interest thereon from the 12th "day of October, 1907, at the rate of six per cent per "annum, and for their costs and disbursements herein."

Thereafter, on February 15, 1908, the above named defendant filed its answer, which is in words and figures as follows, to-wit:

(TITLE.)

"Comes now the above named defendant, and answer-"ing the complain herein says:

I.

"This defendant has not sufficient knowledge or infor-"mation to form a belief as to the truth of the allegations "of the first paragraph of the complaint, and therefore "denies each and every allegation thereof.

II.

"This defendant admits the allegations of the second "paragraph of the complaint, and alleges that it has paid "its annual license fee due to the State of Washington.

III.

"This defendant admits that the amount in controversy "herein exceeds the sum of two thousand dollars "($2000.00), but denies that it equals the sum of six thou-"sand two hundred seventy-two dollars ($6272.00).

IV.

"Referring to the fourth paragraph of the complaint, "this defendant denies that said contract was entered into "on the 15th day of October, 1906, and alleges that said "contract was entered into on the 11th day of October, "1906, and confirmed on the 15th day of October, 1906. "This defendant denies that the plaintiffs delivered or dis- "charged at the dock of Galbraith-Bacon & Company at "Seattle Washington, sixteen hundred (1600) casks of "China clay of the P. X. Y. brand, and denies that the "China clay of the said brand so delivered at the said "wharf contained eight hundred and ninety-six thousand "(896,000) pounds, and denies that this defendant took "delivery of said clay from alongside said ship and ex "said ship at Seattle, Washington.

V.

"This defendant denies that the clay so sold and deliv- "ered by the plaintiffs to defendant was of the contract "price of sixty-two hundred and seventy-two ($6272.00) "dollars or any sum in excess of three thousand three hun- "dred and seventy-five and 12-100 ($3375.12) dollars.

"And further answering the complaint, and by way of "an affirmative defense, this defendant alleges:

I.

"That on or about the 11th day of October, this defend- "ant ordered of the plaintiffs from three hundred (300) "to four hundred (400) tons of P. X. Y. China clay, to be "fully equal to sample which had been theretofore submit- "ted by the plaintiffs to the defendant at the contract price "of seventy ($0.70) cents per one hundred (100) pounds, "ex ship at Seattle, Washington, duty paid. Said order "was accepted by the plaintiffs on or about the 15th day of "October, 1906, and thereafter the defendant in the month "of October, 1907, delivered on the wharf of Galbraith-

"Bacon & Company at Seattle, Washington, sixteen hun-
"dred (1600) casks of alleged China clay. It is not custom-
"ary in the clay trade to inspect casks on board the dock
"in Seattle, because of the expense and inconvenience, and
"pursuant to the custom existing in the trade, the said
"clay was forwarded to the factory or plant of the defend-
"ant at Everett, Washington, where upon an inspection it
"was found that of the said clay eight hundred and sixty-
"one (861) casks conformed to sample submitted of P. X.
"Y. brand, and that seven hundred and thirty-nine (739)
"casks were of an entirely different brand, the markings
"of which were almost identical with the good brand and
"not easily distinguishable therefrom, and that said differ-
"ent brand of seven hundred and thirty-nine (739) casks
"was far inferior to the sample submitted by the plaintiffs,
"and upon which the contract was based.

II.

"Immediately on the discovery that there was included
"in the said shipment of clay casks of said different brand,
"and of the inferior quality, this defendant notified the
"plaintiffs thereof and refused to accept the shipment.

III.

"At the time the defendant discovered that the plain-
"tiffs had included in the shipment clay of a grade inferior
"to sample, there were still remaining on the dock of Gal-
"braith-Bacon & Company at Seattle, Washington, two
"hundred and fifty-three (253) casks. This defendant
"promptly notified the plaintiffs that the shipment was
"not in accordance with sample, and after some correspond-
"ence it was agreed between the parties that the defend-
"ant should take to its plant at Everett the remaining two
"hundred and fifty-three (253) casks without admission
"of liability for the shipment and without expense to it
"if defendant's claim as to the inferiority of the clay should
"be proved correct.

IV.

"That of the two hundred and fifty-three (253) casks "shipped to Everett under the agreement described in "paragraph III hereof, one hundred and thirty-three (133) "casks were of the poorer brand, inferior to sample, and "are now and at all times have been held by this defend- "ant as the property of the plaintiffs and subject to their "orders, together with the six hundred and six (606) casks "inferior to sample also in the hands of this defendant.

V.

"That this defendant has offered, and has at all times "been and now is ready and willing to return the said six "hundred and six (606) casks inferior to sample to the "wharf in the said City of Seattle, where the same were "first unloaded, without expense to the plaintiffs, and here "and now offers so to do, but that the plaintiffs have at "all times been unwilling to receive the same and have "refused to reaccept the same or any portion thereof.

VI.

"That the value of the eight hundred and sixty-one "(861) casks of P. X. Y. clay like the sample is three "thousand three hundred and seventy-five and 12-100 "($3375.12) dollars, and the interest thereon from October "12th, 1907, to date of this answer is the sum of fifty and "63-100 ($50.63) dollars. Defendant herewith brings into "the registry of this court the amount due therefor, to-wit: "the sum of thirty-four hundred twenty-five and 75-100 "($3425.75) dollars.

"Wherefore, defendant prays that the plaintiffs recover "no judgment herein, and that this action be dismissed "without further costs to this defendant."

Thereafter, on November 7, 1910, the plaintiffs filed an amended reply, which is in words and figures as follows, to-wit:

(TITLE.)

"Come now the above named plaintiffs and by leave of "Court first had and obtained file this their amended "reply to the further answer and affirmative defense of "the defendant and deny and allege as follows:

I.

"For reply to paragraph I of the further answer and "affirmative defense of the defendant, plaintiffs admit that "on or about the 11th day of October, 1906, they contracted "to deliver to the defendant from 300 to 400 tons of P. X. Y. "China clay of a quality equal to sample theretofore sub- "mitted by them to the defendant, at the contract price of "70 cents per 100 pounds ex ship at Seattle, Washington, "duty paid, and that thereafter and in the month of Octo- "ber, 1907, they delivered on the wharf of Galbraith-Bacon "& Company at Seattle, 1600 casks of clay, but they deny "that a portion of the clay so delivered did not conform to "sample, and deny that 739 casks thereof or any casks "thereof were far or at all inferior to the sample submit- "ted by them to defendant, and they deny that it is not cus- "tomary in the clay trade to inspect casks on board the "dock in Seattle, and they deny that any expense or incon- "venience would be occasioned by inspection at Seattle, "and they deny that the custom alleged in said paragraph "exists, and they deny that pursuant to said alleged cus- "tom said clay was forwarded to the factory or plant of "defendant at Everett, Washington, but on the contrary, "they allege that said clay was forwarded by the defend- "ant to Everett, Washington, because it had taken deliv- "ery of said clay pursuant to said contract, on dock at "Seattle, Washington, and that said clay so forwarded "was the property of the defendant and so forwarded at "defendant's risk and defendant's expense.

II.

"For reply to paragraph II of the further answer and "affirmative defense of the defendant, plaintiffs deny the "same and each and every allegation therein contained.

III.

"For reply to paragraph III of the further answer and "affirmative defense of defendant, plaintiffs deny the same "and each and every allegation therein contained.

IV.

"For reply to paragraph IV of the further answer and "affirmative denfense of defendant, plaintiffs deny the same "and each and every allegation therein contained.

V.

"For reply to paragraph V of the further answer and "affirmative defense of defendant, plaintiffs deny the same "and each and every allegation therein contained, save and "except they admit that they refused to permit defendant "to return to them any portion of the clay sold and deliv- "ered by them to the defendant.

VI.

"For reply to paragraph VI of the further answer and "affirmative defense of defendant, plaintiffs deny that 861 "casks of the clay so sold and delivered by them to defend- "ant are alone equal to sample, but on the contrary, they "allege that all the clay delivered by them to defendant on "the wharf of Galbraith-Bacon & Company at Seattle, "Washington, is equal to sample, and they deny that inter- "est on the money which by said paragraph defendant "alleges it has paid into Court, from October 12, 1907, to "the date of said answer is the sum of $50.63, but on the "contrary, they allege that the interest upon said amount

"is at the rate of nine (9) per cent per annum, the same "being the contract price and agreement of the parties.

"Further replying to the further answer and affirma- "tive defense of the defendant herein, plaintiffs allege as "follows:

"That the clay which the defendant pretended to reject "was accepted and taken by said defendant to its manu- "facturing plant at Everett, Washington, and there stored "by it; that the said casks of clay pretended to be rejected "were placed in the open, upon the bank of a river, without "any shelter or covering over the same, and the defendant "allowed and suffered the said clay, and now allows and "suffers the same to remain in the open air without shelter "or cover, exposed to the action of the wind, sun, dust, rain "and snow, and further that floods occuring in the river, "on the banks of which the said clay had been placed, over- "flowed the said clay and greatly deteriorated and depre- "ciated its value; that the said clay was not in condition "to be returned to the plaintiffs herein, and the same was "not in the condition that it was when delivered to the "defendant; that the said clay now is worthless and of no "value whatsoever, the decrease and loss of value being "due to the defendant's carelessness and negligence in not "properly storing the clay and reasonably protecting it "from the elements which so greatly damaged it.

"Wherefore, plaintiffs demand judgment in accordance "with the prayer of their complaint."

Thereafter, upon a trial of the case an opinion was rendered by the Court, speaking through Judge Hanford, upon the merits, which is in the following words and figures, to-wit:

(TITLE.)

"This is an action at law, tried by the Court, a jury "trial having been waived. The action is to collect the "price of 400 tons of China clay sold and delivered by the

"plaintiffs to the defendant. The contract for the sale of "the clay was made by correspondence between the parties, "and as construed by the Court, it is a contract for a sale "by sample, and there is an implied warranty of quality "corresponding to the sample referred to in the correspond- "ence. 15 Am. & Eng. Enc. of Law (2nd Ed.) pages 1225-6. "The clay was bought in England and transported by ship "to Seattle, and there is no dispute between the parties "as to the quantity of the clay shipped and delivered, nor "as to the contract price which the defendant promised to "pay therefor. It is admitted also that payment of the "purchase price has been demanded and refused, except "as to part, and other jurisdictional facts are admitted. "The contract, as construed by the Court, obligated the "defendant to receive the clay from the ship, which con- "dition precluded inspection by the purchaser before deliv- "ery. This is so for the reason that clay, to be of the qual- "ity warranted, must be of uniform white color and free "from grit, and to determine the quality, time, favorable "conditions and special conveniences for testing are nec- "essary, and these essentials make a fair inspection while "the ship is being discharged impracticable. The defend- "ant did not in fact inspect the clay to ascertain its quality "before receiving it, but afterwards ascertained that it "came from two different sources of supply and that it is "not uniform in quality, 800 barrels thereof being inferior "to the sample and unsuitable for the defendant's use. "The defendant used and has tendered payment at the con- "tract rate for 861 barrels, and disputes its liability to pay "for 800 barrels because of the inferior quality thereof. "The plaintiffs' contention is that notwithstanding the "inferior quality of 800 barrels of the clay, the defendant "accepted delivery of the entire consignment, and by doing "so waived its right to reject any part of the same. The "defendant did not intend a waiver of its right to have "delivered that which it had agreed to buy and pay for, "viz.: Clay of the same quality as the sample. On the "contrary, it was prompt in giving notice to the plaintiffs

"of the inferior quality of the clay, and has acted fairly "towards them in minimizing the loss by making use of, "and tendering payment for, all of the clay fit for use and "by holding the rejected portion subject to the plaintiffs' "right to dispose of it. The plaintiffs' contention is "founded upon the false idea that the defendant was "legally bound to either accept the commodity of which "delivery was tendered, and pay the contract price for all "of it, regardless of its quality, or else refuse to receive "possession of it. This idea is contrary to the rule of law "applicable to the case, because it ignores the implied war- "ranty upon which the defendant had a right to rely. The "defendant acted within its legal rights in taking posses- "sion of the clay and resisting the plaintiffs' demand for "the price of the portion inferior to the sample. In this "country the rule is well established by numerous decisions "of the courts that a breach of an implied warranty of "quality entitles the vendee to retain the goods and when "sued for the purchase price to set up the breach of war- "ranty to reduce the sum recoverable by the vendor. 15 "Am. & Eng. Enc. of Law (2nd Ed.) page 1255; 24 id., "page 1158; Saunders v. Short, 86 Fed. Rep, 225; Andrews "v. Schreiber, 93 Fed. Rep. 367; Florence Oil & Refining "Co. v. Farrar, 109 Fed. Rep. 254. The measure of dam- "ages which the vendee may claim for breach of an implied "warranty of quality is the difference between the actual "value of the property delivered and the higher value of "the warranted quality; and if there is no other evidence "of value, the price agreed to be paid will be regarded as "the value of the property of the quality warranted. In "this case, the defendant having offered to return the "inferior clay and to hold it subject to disposition by the "plaintiffs, the contract price is the measure of damages "which it is entitled to recoup.

"The Court directs that findings be prepared in "accordance with this opinion, and the judgment to be "entered will be that the plaintiffs take nothing, save and "except the amount of money deposited in the registry of

"the Court by the defendant, and that the defendant "recover the taxable costs occasioned by the litigation sub- "sequent to the making of said deposit."

SPECIFICATIONS OF ERROR

The following are the specification of errors relied upon by plaintiffs in error and which are intended to be urged by it upon the writ of error as grounds for reversal of said judgment in the Circuit Court.

This specification of errors is the same as the assignment of errors (transcript of record, page 49):

I.

"That the United States Circuit Court in and for the "Western District of Washington, Northern Division, erred "in overruling the objection of counsel for plaintiffs in "error to the introduction of evidence at the trial of said "cause of the letter being marked defendant's exhibit No. "'1.' That the said letter is in words and figures as fol- "lows, to-wit:

"DEFENDANT'S EXHIBIT NO. '1.'

"Meyer, Wilson & Co., "Portland, Oregon.
"Meyer, Wilson & Co., "San Francisco, Cal.
"Meyer, Wilson & Co., "Liverpool.

Telegraphic Addresses:
'Meyer,' Portland.
'Meyer,' San Francisco.
'Rodgers,' Liverpool.

"Received Oct. 1, 1906. "Everett Pulp & Paper Co.

Answered Oct. 1, 1906.
Wm. Howarth.

"Portland, Oregon, Sept. 29, 1906. Saturday.

"Messrs. Everett Pulp & Paper Co., "Everett, Washington.

"Dear Sirs: Referring to the correspondence we had "heretofore with you regarding China clay, we now have

"the pleasure of advising you that we send you under sep-
"arate cover a sample marked 'P. X. Y.' of an English
"China clay, which the makers believe matches your own
"sample very well, and we trust that you will find it so. It
"is probable that we could work your order for a quantity
"of not less than 400 to 500 tons of this P. X. Y. China
"clay in one-half ton casks with extra iron hoops, which
"packages have in our previous shipments proved very sat-
"isfactory, indeed, at the price of 76½ cents per 100
"pounds ex ship at Seattle; wharfage, if any, on the goods
"for buyer's account as usual. Will you kindly let us
"know whether you are inclined to place an order with us
"on this basis. We have not a vessel at the present time,
"but our efforts are toward securing such a ship for Puget
"Sound. We have actually secured a vessel for the same
"business for Portland, Oregon, but this, of course, does
"not help us in any transaction with you. Sailing vessels
"are somehow becoming scarcer and scarcer for this desti-
"nation, as owners seem to prefer to send their craft in
"other directions; therefore we would suggest that it would
"be well to place your order with us subject to cable reply
"in, say, a week or even a fortnight, so as to give our Liver-
"pool house a fair chance to work up the business, and in
"conjunction with the same, the balance of the cargo.

"We may say that freights are quite high at present,
"but they are also very likely to remain so for many months
"to come, as the demand for building material at San Fran-
"cisco, and also for Valparaiso, has the tendency to stiffen
"the freight market.

"One reason why we are approaching you at the present
"time is that we have other cargo for Puget Sound in sight,
"and various business has to be worked up in conjunction
"with the China clay to complete the transaction. We may
"say, when we report that the casks we use have given
"satisfaction, that we have a number of shipments deliv-
"ered here to go by, and we have given this matter of secur-
"ing a satisfactory package for China clay very consider-
"able attention, so that it has happened repeatedly that we

"have delivered China clay in excellent order and condi-
"tion when others received their shipments practically in
"bulk.

"Hoping to hear from you, we are, dear sirs,

"Yours very truly,

"MEYER, WILSON & CO.

"If you elect to place an offer with us we shall imme-
"diately cable same to our Liverpool house, who will then
"work on the matter at once and try to bring it to com-
"pletion as quickly as possible. M., W. & Co."

2.

"That the said Court erred in overruling the objection
"of counsel for plaintiffs in error to the introduction of
"evidence at the trial of said cause of a sample of clay, the
"same being marked defendant's exhibit '2.'

3.

"That the said Court erred in overruling the objection
"of counsel for plaintiffs in error to the introduction of
"evidence at the trial of said cause of a letter written by
"the defendant to the plaintiffs under date of October 11,
"1906, said letter being marked defendant's exhibit '3,' and
"is in words and figures as follows, to-wit:

"DEFENDANT'S EXHIBIT NO. '3.'

"October 11-'06.

"Mr. Alfred Tucker,
"Care of P. J. Fransioli & Co.,
"Seattle, Washington.

"Dear Sir: Confirming the writer's telephonic com-
"munication to you today; please enter our order for 3/400
"tons of P. X. Y. China clay, to be fully equal to the sample
"which you submitted to us, at the price quoted by you,
"viz.: 70 cents per 100 pounds, ex ship at Seattle, duty
"paid.

"It is understood that this is to be packed in 5-cwt. casks "reinforced with iron hoops, and is for November/Decem- "ber shipment.

"Kindly send us your confirmation of this.

"This being our initial order with you, we sincerely "hope that everything will come out satisfactory, and that "a nice business will result. Yours truly,

"Secretary."

4.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of the witness, Augustus Johnson:

"Q. 'You say you made this examination. What is "the use to which clay is placed in the paper business, and "why is it necessary for you to examine the color and per- "centage of grit?' To which question counsel for plaintiffs "in error objected, which objection was overruled by the "Court, to which ruling the plaintiffs then and there duly "excepted, which exception was allowed by the Court. In "answer to the question witness responded as follows:

"A. 'Clay is used as a filler in the paper manufacture "in order to close the pores between the fibers. The per- "centage of grit is the important feature for the reason "that if it contains a large percentage of grit it will show "up and make the paper spotty; the paper, therefore, "becomes unmerchantable. A printer cannot use it for "the reason that it wears out his type.'

"Q. 'Does it have any effect upon the use for writing "paper upon the pen?'

"A. 'It does. The pen will scratch. It is very unsatis- "factory for that. Further, in the case of grit in clay it "wears out the wires on the paper machines.'

"Q. 'What effect does the wearing out of the wire have "upon increasing the cost to the manufacturer?'

"A. 'A great deal of effect. Further, it must have a "white color in order to produce a white sheet of printing "paper.' "

5.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the introduction of "evidence at the trial of said cause of a letter dated Octo- "ber 15, 1907, written by the plaintiffs in error to the "defendant, which said letter is marked defendant's exhibit " '5,' and is in words and figures as follows, to-wit:

"DEFENDANT'S EXHIBIT NO. '5.'

"Meyer, Wilson & Co.,
"Portland, Oregon.
"Meyer, Wilson & Co.,
"San Francisco, Cal.
"Meyer, Wilson & Co.,
"Liverpool.

Telegraphic Addresses:
'Meyer,' Portland.
'Meyer,' San Francisco.
'Rodgers,' Liverpool.

"Everett Pulp & Paper Co.
"Received Oct. 17, 1907.
"A. M. Answered P. M.
"7-8-9-10-11-12 1-2-3-4-5-6

"Portland, Oregon, Oct. 15, 1907.

"Messrs. The Everett Pulp & Paper Co.,
"Everett, Washington.

"Dear Sirs: The samples of China clay, ex 'Mozam- "bique,' which you forwarded us, we immediately passed "on to our San Francisco house, and they in turn sub- "mitted these samples to experts, and they now report to "us on same as follows: 'To sum up the whole thing we "may state that the China clay shipment, ex 'Mozambique,' "is up to the original sample.' In this connection we may "tell you that when we sent you the sample of P. X. Y. "China clay, upon which you purchased from 300-400 tons, "we retained one-half of the sample here, and this we for- "warded, with the others from yourselves, to our San Fran- "cisco house, so that they and experts have had every "opportunity of studying this matter fully.

"Regarding the different colors, it is stated that these "are readily explained by the different degrees of moisture

"in the clay, and that when the clay is dried out the sample "regains the original color; that samples taken from differ- "ent parts of the same casks show slight differences in the "color is accounted for by the fact that in the parts of the "barrel more exposed to moisture the clay is darker, whereas "where less exposed it is lighter. Absolutely no sand has "been found in any of the samples of the clay you furnished "us, there being a total absence of grittiness, and, therefore, "there can be no extraneous matter. The samples were "submitted to a man of very considerable experience in "San Francisco in China clays, and after thoroughly exam- "ining the samples he stated that there was neither sand "nor grit in any of the samples, and, further, that the clay "was all of one color, but that some had absorbed moisture "of a more or less degree, which affected the color some- "what, but that it was quite evident to him that the samples "were all the same clay and of the same color originally, "which undoubtedly it would regain when dried.

"You will, of course, recall that we sold you this ship- "ment of clay not to be as per sample, but after submitting "you sample of the P. X. Y. brand to show you the gen- "eral quality of same we sold you 300-400 tons of the "P. X. Y. brand. Throughout the world it is the custom, "even if one sells as per sample, to sell only about as per "sample, for none of these samples can be absolutely "guaranteed, as is, of course, well known to you.

"You are, of course, also aware that you had to take "delivery of the China clay from alongside vessel as dis- "charged in Seattle, and that it was your duty to have "a representative at the ship to examine the clay and "accept or decline the clay there on the wharf where dis- "charged. We never agreed to allow the clay to be trans- "shipped from Seattle to Everett to your works, and there "accept or reject. The terms of our contract are very clear "on this.

"We have been hoping to hear of your Mr. Johnson's "return from San Francisco and that he would call upon "us when passing through Portland. We presume that he

"has not yet reached Everett and that we may expect a "call from him any time, when we shall, of course, go over "the matter very thoroughly with him, and it is quite pos- "sible that the writer may be in Seattle in the near future, "when, if it be deemed expedient, he can run up to Everett.

"Yours very truly,

"Pr. Pro. MEYER, WILSON & CO.
"Alfd. Tucker."

6.

"That the said Court erred in overruling the motion by "counsel for plaintiffs in error to strike from the record "the following testimony given and offered by Augustus "Johnson:

"Q. 'Now, after this ship Mozambique arrived and a "portion of the clay had been taken to the defendant's "works at Everett, state, if you please, what the defend- "ant did with the clay with reference to its use.'

"A. 'The clay was landed at our wharf and stored in "the yard in our usual clay storing place. We were short "of clay. We were anxious for the arrival of the ship and "immediately upon receiving a telegram from Mr. Tucker "to the effect that the Mozambique had arrived we pro- "ceeded to bring the clay to the mill. There were a few "broken casks—some broken casks, and we started to use "that first. It was discovered almost immediately that the "color of the paper was down, and we started to trace and "it was found that it was the clay. Instructions were then "given to discontinue the use of that clay. Mr. Tucker was "advised, and after a great deal of correspondence Mr. "Tucker came to the mill.'

"Q. 'I will now show you a letter dated October 15th, "1907, and ask you if that was a letter which you received "from the Meyer, Wilson Company, signed by Mr. Tucker, "in regard to this clay at that time.' (Hands witness "paper)?

"A. 'That is the letter.'

"Mr. Brownell: We offer the letter in evidence as "defendant's exhibit '5.'

"The Court: It may be admitted.

"Defendant's exhibit '5' is in words and figures as fol- "lows, to-wit:

"DEFENDANT'S EXHIBIT NO. '5.'

"Meyer, Wilson & Co., Telegraphic Addresses:
"Portland, Oregon. 'Meyer,' Portland.
"Meyer, Wilson & Co., 'Meyer,' San Francisco.
"San Francisco, Cal. 'Rodgers,' Liverpool.
"Meyer, Wilson & Co.,
"Liverpool.

"Everett Pulp & Paper Co.
"Received Oct. 17, 1907.
"A. M. Answered P. M.
"7-8-9-10-11-12 1-2-3-4-5-6

"Portland, Oregon, Oct. 15, 1907.

"Messrs. The Everett Pulp & Paper Co.,
"Everett, Washington.

"Dear Sirs: The samples of China clay, ex 'Mozam- "bique,' which you forwarded us, we immediately passed "on to our San Francisco house, and they in turn submit- "ted these samples to experts, and they now report to us "on same as follows: 'To sum up the whole thing we may "state that the China clay shipment, ex 'Mozambique,' is "up to the original sample.' In this connection we may "tell you that when we sent you the sample of P. X. Y. "China clay, upon which you purchased from 300-400 tons, "we retained one-half of the sample here, and this we for- "warded, with the others from yourselves, to our San Fran- "cisco house, so that they and experts have had every "opportunity of studying this matter fully.

"Regarding the different colors, it is stated that these "are readily explained by the different degrees of moisture "in the clay, and that when the clay is dried out the sample "regains the original color; that samples taken from differ-

"ent parts of the same casks show slight differences in the "color is accounted for by the fact that in the parts of the "barrel more exposed to moisture the clay is darker, "whereas, where less exposed it is lighter. Absolutely no "sand has been found in any of the samples of the clay you "furnished us, there being a total absence of grittiness, "and, therefore, there can be no extraneous matter. The "samples were submitted to a man of very considerable "experience in San Francisco in China clays, and after "thoroughly examining the samples he stated that there "was neither sand nor grit in any of the samples, and, fur- "ther, that the clay was all of one color, but that some had "absorbed moisture of a more or less degree, which affected "the color somewhat, but that it was quite evident to him "that the samples were all the same clay and of the same "color originally, which undoubtedly it would regain when "dried.

"You will, of course, recall that we sold you this ship- "ment of clay not to be as per sample, but after submitting "you sample of the P. X. Y. brand to show you the gen- "eral quality of same we sold you 300-400 tons of the "P. X. Y. brand. Throughout the world it is the custom, "even if one sells as per sample, to sell only about as per "sample, for none of these samples can be absolutely guar- "anteed, as is, of course, well known to you.

"You are, of course, also aware that you had to take "delivery of the China clay from alongside vessel as dis- "charged in Seattle, and that it was your duty to have a "representative at the ship to examine the clay and accept "or decline the clay there on the wharf where discharged. "We never agreed to allow the clay to be trans-shipped "from Seattle to Everett to your works, and there accept "or reject. The terms of our contract are very clear on "this.

"We have been hoping to hear of your Mr. Johnson's "return from San Francisco and that he would call upon "us when passing through Portland. We presume that he "has not yet reached Everett and that we may expect a

"call from him any time, when we shall, of course, go over "the matter very thoroughly with him, and it is quite pos- "sible that the writer may be in Seattle in the near future, "when, if it be deemed expedient, he can run up to Everett.

"Very truly yours,

"Pr. Pro. MEYER, WILSON & Co.

"Alfd. Tucker."

"Q. How were those casks marked, Mr. Johnson?

"A. Those casks were marked with a Diamond A, "Great Britain.

"Q. Were they marked with the term P. X. Y.?

"A. No, sir.

"Q. Was there anything on the casks to designate "P. X. Y.?

"A. None whatever.

"Q. What was meant by the term P. X. Y. as used in "this correspondence and in the contract which was exe- "cuted?

"A. It simply referred to the samples of clay that had "been submitted to us as being a sample of that particular "brand that they had offered to us. We always buy clay on "sample. We must do it. We request a sample, and in "making a purchase of clay, samples are immediately sub- "mitted for a test to see if they suit our purposes.

"Q. Of this shipment what proportion was in accord- "ance with this sample inspected by you as the P. X. Y. "brand?

"A. Well, that I can't say, Mr. Brownell, what propor- "tion, because I left the mill in January after that. I went "to San Francisco.

"Q. You then took charge of the San Francisco office?

"A. Yes, sir.

"Q. And you had no further connection with this par- "ticular transaction?

"A. No.

"Mr. Brownell: That is all.

"Counsel for plaintiffs in error moved the Court to "strike the testimony of Mr. Johnson from the record on "the ground and for the reason that the contract entered "into between the parties and introduced in evidence "showed that the clay was to be taken from alongside the "vessel at once upon discharge at Seattle, Washington, "the testimony of witness being to the effect that the clay "was not to be accepted from place mentioned in said con- "tract and, furthermore, the testimony of witness showed "that it did take delivery at such place, assume ownership "and dispose of same according to the defendant's wishes, "which evidence of the disposing of the clay after accept- "ing the same was immaterial to any issues presented in "this cause. Which motion to strike the Court denied, to "which ruling the plaintiffs then and there duly excepted, "which exception by the Court was then and there allowed."

7.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of witness Alex Baillie:

"Q. 'Are you acquainted with the customs prevailing "at the Port of Seattle with respect to inspection and "delivery and examination of China clay as it arrives on "board ship?' which objection was by the Court overruled "and an exception duly allowed to the plaintiffs in error, "to which question in answer thereof the following testi- "mony was given by Alex Baillie:

"A. 'I am.'

"Q. State now, if you please, what is meant by the "term 'Delivery ex ship,' or alongside ship on the dock at "Seattle, as distinguished from examination and inspec- "tion of the quality or class, if there is such a distinction "in the trade.

"Mr. Hunt: If your honor, please, I wish it to be "understood that my objection goes to this whole line of "testimony.

"The Court: Yes, you can have your exception.

"A. Well, acceptance of delivery is considered simply "the condition of the packages.

"Q. I beg your pardon?

"A. The condition of the packages.

"Q. Well, if it is casks, what does it mean? By pack- "ages you mean casks?

"A. Yes, or bags, or boxes, or anything.

"Q. In the China clay trade, would it be possible to "ascertain the character of China clay as to being of a cer- "tain brand or not, alongside of the ship?

"A. I should think not.

"Q. I call your attention now to defendant's exhibit "'1,' being the contract in this case in which the words "occur, 'Net invoice weight ex ship at Seattle, Washing- "ton,' also, 'Purchaser to take delivery of China clay from "alongside of vessel at once on discharge at Seattle,' and "ask you if in the trade the language of that contract "would mean that an inspection to determine the class and "character of the clay must be made alongside of the ship, "or if any inspection should be made alongside of the ship "other than to determine whether any of the casks were "broken or not?

"A. I don't see how the quality could be determined "alongside ship.

"Q. In your business would the word 'delivery,' used "in a contract like that, be held to include an inspection "and examination of the class and character of the con- "tents?

"Mr. Hunt: I object to that question. Mr. Baillie's "business may not be pertinent in this case.

"Q. Well, in the trade as you have carried it on; in the "China clay trade as you have carried it on?

"A. No."

8.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of the witness A. H. P. Jordan:

"Q. 'Now, then, with reference to the trade, the terms "of purchase and sale of China clay; by the term 'delivery' "of China clay in the trade, particularly as the trade takes "place here in the City of Seattle and State of Washing- "ton—what is meant?' which objection of counsel for plain- "tiffs in error was overruled by the Court and the excep- "tion duly allowed; to which question the witness "responded as follows:

"A. Why, the clay that we have bought for delivery— "it means the taking of the clay at the ship's side.

"Q. Is it possible at the ship's side to make a test as to "the character and quality of the clay which you have "described; commercially possible?

"A. No.

9.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of the witness A. H. P. Jordan:

"Q. 'What effect would clay containing the percentage "of grit like the sample rejected have upon the paper mak- "ing machine?' which objection the Court overruled, the "plaintiffs in error being allowed an exception. The "answer of the said witness to the said question is as fol- "lows:

"A. 'Well, it wears out what is called the cloth on the "machine. The shape of the paper is formed on an apron "of wire, the cost of which is about $125 or $130, and a "large percentage of grit running in the paper, the wire is "endless and travels round and round, forming the sheet "on top—that rapidly wears out this wire, which instead "of lasting, as it should, about twenty days it lasts six or "eight. It also wears out the rolls on the machine and the "wheels and the belts which carry the wet paper.

10.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of witness A. H. P. Jordan:

"Q. 'Did I ask you what sort of effect this had in the "paper itself, besides increasing the cost of manufactur- "ing?" which objection said Court overruled and duly "allowed the plaintiffs in error an exception; to which "question the witness replied:

"A. 'Well, this clay we rejected; we simply couldn't "use it in the manufacture of our grade of paper.'

11.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to a photograph of a "shipment of clay placed in the storage yard of the defend- "ant, which objection was overruled by the Court and an "exception duly allowed the plaintiffs in error.

12.

"That the said Court erred in overruling the objection "of counsel for plaintiffs in error to the following question "asked of witness William Howarth:

"Q. 'By the term 'delivery' in the trade and in these "contracts that are made, what is the usual understand- "ing, or what is the understanding in the trade as com- "pared with acceptance or examination?' to the overruling "of which objection counsel for plaintiffs in error excepted, "which exception was duly allowed. In reply to the above "question witnesss replied as follows:

"A. 'My understanding is that any apparent defects "which can be discovered at the ship's side must be com- "plained of at that time, so that the rights of the shippers "have not been stopped as against the ship, if there has "been any apparent damage caused en route. As far as "examination of enclosed packages, such as clay, where "the defects are not latent, and where it needs consider-

"able time and skill to make the examinations, then the "goods have always been permitted to go up to the mill, "even after the defects have been found, and this is the "first instance that we have been advised that we have "taken delivery and that we have, by not rejecting the ship- "ment at the ship's side, accepted the shipment, and we "must pay for it whether it contains another thing than "what we contracted for.

13.

"That the said Court erred in overruling and denying "the motion made by counsel for plaintiffs in error at the "close of the testimony for judgment on the pleadings, and "also for verdict and judgment upon the case upon the fol- "lowing grounds:

"1. That the defendant had pleaded in its answer and "its evidence proved that it had accepted 861 casks of the "clay, which conformed to the sample submitted, and that "it had rejected 606 casks, which were alleged to be inferior "to the said sample. That under the pleadings and the evi- "dence and where a contract for the sale of personal prop- "erty is entire the defendant will not be allowed to accept "performance of a part of said contract and reject per- "formance of another part.

"2. That under and by the pleadings the defendant has "not counter-claimed for any damages sustained by reason "of the alleged breach of warranty, and hence none can be "allowed to it.

14.

"That the said Court erred in making the following "finding:

" 'The defendant acted within its legal rights in taking "possession of the clay and resisting the plaintiffs' demand "for the price of the portion inferior to the sample. In this "country the rule is well established by numerous decisions "of the courts that a breach of an implied warranty of

"quality entitles the vendee to retain the goods, and when "sued for the purchase price to set up the breach of war- "ranty to reduce the sum recoverable by the vendor. The "measure of damages which the vendee may claim for "breach of an implied warranty of quality is the difference "between the actual value of the property delivered and the "higher value of the warranted quality, and if there is no "other evidence of value the price agreed to be paid will "be regarded as the value of the property of the quality "warranted.

"In this case, the defendant having offered to return "the inferior clay and to hold it subject to disposition by "the plaintiffs, the contract price is the measure of dam- "ages which it is entitled to recoup.'

"That the said finding is contrary to the evidence which "is given by Mr. W. J. Pilz, and which is as follows:

"Q. (By Mr. Hunt): Did you sell a part of the clay "remaining in the yard—of the rejected clay?

"A. I made arrangements to sell it.

"Q. How much did you sell?

"A. About nine tons.

"Q. What was the price which you received.

"A. Part of the clay, I think, sold for $17 a ton of "2,000 pounds at the mill. I think one shipment I sold for "$15, as it was a sample shipment for a carload.

"Q. (By Mr. Brownell): State that in pounds, because "the contract is in pounds.

"A. $17 would be 85 cents a hundred pounds.

"Q. 85 cents a pound?

"A. No, 85 cents a hundred pounds. $17 a ton."

In the argument which here follows the plaintiffs in error deem each specification of error well taken, but we desire to direct the particular attention of the Court to specifications of errors 13 and 14 as being the most serious and which will be most strongly urged upon this writ of error.

ARGUMENT

SPECIFICATIONS OF ERROR ONE AND THREE

Specifications of error 1 and 3 relate to the admission of correspondence between these parties prior to the execution of the formal written contract between them.

We do not believe that any correspondence which may have passed between the parties to this action prior to the date of the formal written contract is pertinent or has any bearing upon the question to be determined under the issues presented in the case. These letters were admitted over the objection and exception of counsel for the plaintiffs in error, the ground of the objection being that any evidence of the prior negotiations should be excluded inasmuch as the parties afterwards entered into a formal written contract which embraced all the terms and conditions which the parties desired to have therein. It is an elementary principle of law that all prior negotiations are merged into the subsequent written agreement, and that evidence of such prior negotiations should be excluded. We are of the impression that the principle suggested here is too elementary to deserve an extended comment in this brief.

We would refer the Court to 2 Parsons on Contracts, 7th Ed. page 678 (bottom paging), where it is said:

"For if a negotiation be conducted in writing, and even "if there be a distinct proposition in a letter, and a distinct "assent, making a contract, and then the parties reduce "this contract to writing, and both execute the instrument, "this instrument controls the letters, and they are not per- "mitted to vary the force and effect of the instrument, "although they may sometimes be of use in explaining its

"terms. Another is, the same desire to prevent fraud "which gave rise to the statute of frauds; for as that statute "requires that certain contracts shall be in writing, so this "rule refuses to permit contracts which are in writing to "be controlled by merely oral evidence. But the principal "cause alleged in the books and cases is, that when parties, "after whatever conversation or preparation, at last reduce "their agreement to writing, this may be looked upon as "the final consummation of their negotiations, and the "exact expression of their purpose. And all of their earlier "agreement, though apparently made while it all lay in "conversation, which is not now incorporated into their "written contract, may be considered as intentionally "rejected. The parties write the contract when they are "ready to do so, for the very purpose of including all that "they have finally agreed upon, and excluding everything "else, and make this certain and permanent. And if every "written contract were held subject to enlargement, or "other alteration, according to the testimony which might "be offered on one side or the other as to previous inten- "tion, or collateral facts, it would obviously be of no use "to reduce a contract to writing, or to attempt to give it "certainty or fixedness in any way."

We would respectfully refer to the cases cited in the notes sustaining the statement in the text.

Also the case of Rucker v. Bolles, 133 Fed. 858, and Davis Calyx Drill Co. v. Mallory et al., 137 Fed. 332.

Under the authorities herein quoted we believe the trial Court erred in admitting and receiving these letters marked defendant's exhibit No. "1" (transcript of record, page 34) and defendant's exhibit No. "3" (transcript of record, page 52); the dates of these letters being, respectively, September 29, 1906, and October 11, 1906, and the date of the contract being October 15, 1906 (transcript of record, page 32).

SPECIFICATIONS OF ERROR FOUR, NINE AND TEN

Specifications of error 4, 9 and 10 relate to the admission of testimony which was intended to show that the clay accepted was not fit for the purposes intended by the Everett Pulp & Paper Company, and that the said clay was harmful to the machinery of the defendant.

Counsel for the defendant asked the witness Augustus Johnson (transcript of record, pages 52 and 53) the following question: "You say you made this examination. "What is the use to which clay is placed in the paper busi- "ness and why is it necessary for you to examine the color "and percentage of grit?" The answer, over the objection of counsel for the plaintiffs, was as follows: "Clay is "used as a filler in the paper manufacture in order to close "the pores between the fibers. The percentage of grit is "the important feature, for the reason that if it contains "a large percentage of grit it will show up and make the "paper spotty; the paper, therefore, becomes unmerchant- "able. A printer cannot use it, for the reason that it wears "out the type." The witness further testified, over objection of counsel for plaintiffs, that a pen used upon such paper would scratch, and, further, such clay wears out the wires on the paper machine; and, further, that it must have a white color in order to produce a white sheet of printing paper.

The same question was asked of the witness A. H. P. Jordan (transcript of record, page 62), to which the witness replied in a similar way as did the witness Johnson, and further described the action of the wire in paper making machinery, the purpose of such wire, and the period for

which such wire would last, and the period for which such wire would last when grit was contained in the clay.

In specification of error 10 witness A. H. P. Jordan was asked what effect the clay had upon the paper besides increasing the cost, to which the witness responded that the clay could not be used for that grade of paper which was manufactured by the defendant company (transcript of record, page 62).

We believe that the trial Court committed error in allowing the testimony to be given as to what effect this clay had on the paper or the cost of manufacture. No question was raised or presented by the issues of this case, for the complaint as filed was upon a contract for the purchase of 300 to 400 tons of China clay (transcript of record, page 32), and the answer alleged the admission of the contract, but that the clay did not correspond to sample and was rejected. The pleadings do not show, neither does the evidence, that this clay was sold by the plaintiffs in error in contemplation of its use for the manufacture of any particular grade of paper, or as a matter of fact for any class or quality of paper whatsoever. The plaintiffs in error did not sell the clay with a warranty that it was appropriate for the manufacture of a particular grade of paper, but the clay was sold only as clay of P. X. Y. brand. If the issue had been properly presented that the clay was sold with a warranty that it was fit for a particular grade of paper then such evidence as offered by these witnesses would have been competent, but the sole issue tendered, that would have any relevancy to this point, was whether or not the clay sold and received by the defendant in error was P. X. Y. brand. We submit to this honorable Court

that the evidence under this specification which tended to show that the clay delivered was not fit for the grade of paper manufactured by the defendant in error was wholly incompetent and irrelevant and immaterial to the issue to be decided by the Court. Such evidence tended to confuse the record and cloud the issues which were formally tendered by the pleading. As far as the contract goes, and the contract is set out on page 32 of the transcript of record, and so far as the pleadings are made relative to said contract no question could have properly been presented to the trial Court as to the effect or expensiveness of the use of the clay so delivered to the defendant in error. And, further, nothing is made to appear that the plaintiffs in error knew what quality of paper, if any, was manufactured by the defendant in error, be it common wrapping paper or high grade book paper. As is said in 9 Wallace's Reports (U. S. Supreme Court), page 726, testimony as to whether or not an article purchased under contract is suitable for the purposes to which it is intended is "inad-"missible * * * * because in such a suit the only questions "are what did the contract call for, and what did the man-"ufacturer furnish."

We would refer this honorable Court to the case of Horner v. Parkhurst et al., 17 Atl. (Maryland) 1027, where it is said:

"Where the seller delivers goods of the character and "quality represented, it is no defense to an action for the "price that they proved to be unsuitable for the buyer's "use."

Also the case of Scott et al. v. McDonald, 9 S. E. (Ga.), page 770.

Upon the authority of these cases and upon the authority and recognized rules of pleading and evidence we submit that the trial Court committed error in receiving the testimony herein complained against.

SPECIFICATION OF ERROR SIX

The sixth specification of error relates to the testimony given by the witness Augustus Johnson, who testified (transcript of record, page 38) that after the clay had been discharged at the dock in Seattle, as per contract (transcript of record, page 32), the defendant in error took possession and shipped the same to its dock at Everett, Washington, and there stored the clay in the yard, that place being its usual storing place; that this was done after a telegram had been received from the managing agent of plaintiffs in error that the clay had arrived in Seattle as per contract, a few of the casks were broken, it was discovered that the paper was down in color and the cause was traced to the use of the clay. Witness identified a letter written to the defendant in error by the plaintiffs in error, which was marked defendant's exhibit No. "5" (transcript of record, page 39), in which the plaintiffs in error denied that the clay so shipped did not correspond to the P. X. Y. brand, and accounted for the difference in color by the fact that some of the clay had absorbed more moisture than the rest, which would have a tendency to make it darker in color until the same was dried out. In this letter we call this Court's attention to the second paragraph from the end (transcript of record, page 40), where it is said: *"You are, of course, also aware that you had to "take delivery of the China clay from alongside vessel as*

"discharged in Seattle, and that it was your duty to have "a representative at the ship to examine the clay and accept "or decline the clay there on the wharf where discharged. "We never agreed to allow the clay to be trans-shipped "from Seattle to Everett to your works, and there accept "or reject. The terms of our contract are very clear on "this." Mr. Johnson further testified that all of the casks were marked with a Diamond A, Great Britain; that there was no marking on the casks of P. X. Y. Witness further testified of the custom of the defendant in error in receiving samples and purchasing on samples. At the conclusion of the testimony counsel for the plaintiffs in error moved the Court to strike the testimony of Mr. Johnson from the record, for the reason *that the purchaser was to take delivery of China clay from alongside vessel at Seattle, Washington, and, further, that the testimony of the witness shows that it had taken possession and delivery of the clay in the place specified in the contract, namely, from alongside vessel on discharge, had assumed complete ownership thereof and trans-shipped the same to Everett, a city about thirty miles from Seattle, the same being the place where its works were situated.* Whatever the defendant in error did after they accepted delivery of the clay is wholly immaterial to any issue presented in this case, and the same argument as presented under specifications 4, 9 and 10 is applicable here. Whatever may have been done with the clay after it passed to the ownership of the defendant in error is inapplicable to the issue of the case. Furthermore, Mr. Johnson testified, as we have heretofore said, as to the custom of the defendant in error in buying clay and having samples submitted. Such custom is not binding upon the

plaintiffs in error, the vendors of this property, and it had no place in this case. We submit that the testimony of Mr. Johnson was given under a ruling of the Court which was error.

SPECIFICATION OF ERROR SEVEN

Specification of error 7 relates to the testimony offered by Alex Baillie, a witness on behalf of the defendant in error. The testimony of Mr. Baillie was introduced for the purpose of showing a custom in the Port of Seattle in order to change and vary the clear and unambiguous terms of the written contract. We quote the testimony of Mr. Baillie which is pertinent to the point here presented. The following questions were asked of and given by the witness Baillie (transcript of record, page 60) :

"Q. Are you acquainted with the customs prevailing "at the Port of Seattle with respect to inspection and deliv-"ery and examination of China clay as it arrives on board "ship?" to which the witness responded, over the objection of plaintiffs in error, "A. I am."

"Q. State now, if you please, what is meant by the "term 'Delivery ex ship,' or alongside ship on the dock at "Seattle, as distinguished from examination and inspec-"tion of the quality or class, if there is such a distinction "in the trade."

"A. Well, acceptance of delivery is considered simply "the condition of the packages."

"Q. Well, if it is casks, what does it mean? By pack-"ages you mean casks?"

"A. Yes, or bags, or boxes, or anything."

"Q. In the China clay trade, would it be possible to "ascertain the character of China clay as to being of a cer-"tain brand or not, alongside of the ship?"

"A. I should think not."

"Q. I call your attention now to defendant's exhibit "'1,' being the contract in this case in which the words "occur, 'Net invoice weight, ex ship at Seattle, Washing- "ton,' also, 'Purchaser to take delivery of China clay from "alongside of vessel at once on discharge at Seattle,' and "ask you if in the trade the language of that contract "would mean that an inspection to determine the class and "character of the clay must be made alongside of the ship, "or if any inspection should be made alongside of the ship "other than to determine whether any of the casks were "broken or not?"

"A. I don't see how the quality could be determined "alongside ship."

"Q. In your business would the word 'delivery' used "in a contract like that be held to include an inspection "and examination of the class and character of the con- "tents?"

"A. No."

The testimony of the witness Baillie was given for the purpose of showing a custom or usage which varied and changed the terms of a written contract. Under the authorities such testimony will not be received, and the admission of the same is contrary to all rules of evidence.

The contention of counsel for plaintiffs in error is that the contract entered into between these parties is plain and unambiguous, and if this is true, evidence of a custom will not be received to change or alter the clear and plain written and contractual expression of the parties to a contract. The contract provides that the clay is to be delivered ex ship Seattle, and that the purchaser is to take delivery of China clay from alongside vessel at once on discharge at Seattle, Washington. This defendant in error is *sui juris* and is competent to make any contract which it sees fit, and if in this contract they agree, according to the

reasonable, usual and intended interpretation of the words, to take delivery at a certain place, then they are bound by that contract. Defendant in error seeks to introduce evidence to show an alleged custom as to the interpretation of the word "delivery." We are of the impression that the word "delivery" has an unambiguous meaning both in its ordinary and legal sense, and that the word "delivery" was not inserted in the contract in contemplation of any unknown or unusual interpretation or custom which prevailed in the Port of Seattle in respect to it. It must be remembered that this contract was entered into between a partnership doing business in Liverpool, San Francisco and Portland, by and through its Portland manager, Mr. Tucker, contemplating a delivery of the clay in Seattle to a corporation having its place of business at Everett, Washington. Can it be said with any reasonableness that this contract was entered into and the word "delivery" inserted therein by and between parties neither of whom were residents of Seattle in relation to any custom which might exist in the Port of Seattle. We submit that the contract was not so entered into, and that any evidence relative to the custom of the Port of Seattle in the interpretation of the word "delivery" as applied to the China clay trade is wholly incompetent and irrelevant, and has no place in this case.

In support of our contention that evidence will not be received of an alleged custom or usage to vary the express and unambiguous terms of a written contract, we would refer the Court to the case of Williams v. Ninemire, 63 Pac. (Wash.) 534, where it is said:

"Here is an expressed contract, according to the claim "of both sides, as to the place where the fat cattle were "to be delivered. While one of them claims the delivery "was to be at London and the other at Montasano, yet both "alike admitted that the place of delivery was a subject of "express agreement between them. 'If parties make a "special contract in relation to a matter which would other- "wise be determined by usage, it follows that they meant "to exclude the application of usage, since otherwise they "would not make a special contract therefor. Whenever "it appears that an agreement has been made upon a par- "ticular point and the controversy is as to the terms of "that agreement, such terms cannot be changed by proof "of usage respecting them; in other words, the special "agreement excludes the usage.' (Citation of authori- "ties.) It is only where a contract is silent in some par- "ticular, or is ambiguous, that proof of custom is admis- "sible, and such proof is then admissible only for the pur- "pose of finding out what the contract really was and not "to overthrow it. Proof of custom is received in some cases "upon the assumption that as to those matters not covered "by express stipulations in the agreement, the parties are "presumed to have made their contract with respect to the "established custom and usage of that place; and these the "law will incorporate into the contract in order to explain "or complete it."

We would also cite the Washington case of Swadling v. Barreson, 59 Pac. (Wash.) 506:

"This question is based upon a specific contract. It "is specifically alleged that the contract was that commis- "sions should be paid when the contract was accepted by "the transportation company, but this claim cannot be "bound by any custom in relation to the payment of com- "missions. * * * * Certainly if this had been the real "contract the defendants could not have been bound by "any custom in relation to the payment of marine com-

"mission, if the custom proven had been to the effect that "the commission was due when the contract was entered "into. Neither could the plaintiff be bound by any custom "shown which was in opposition to this alleged contract, so "that the custom, if any existed, was absolutely immaterial "under the theory announced by both the plaintiff and the "defendants in their respective pleadings."

See also the case of Volrath v. Crow, decided by the Supreme Court of the State of Washington, and reported in 37 Pac. Rep., at page 472.

We would also respectfully refer the Court to the case of Hearns v. Marine Insurance Co., 20 Wallace (U. S. Supreme Court) 488, at page 492, where Justice Swayne says:

"Usage is admissible to explain an ambiguity, but it is "never received to contradict what is plain in a written "contract. If the words employed have an established "legal meaning, parol evidence that the parties intended "to use them in a different sense will be rejected, unless "if interpreted according to the legal acceptance they "would be insensible with reference to the context or to "the extrinsic facts. If no such consequence is involved, "proof of usage is wholly inadmissible to contradict or in "any wise to vary their effect. In no case can it be received "where it is inconsistent with, or repugnant to, the con- "tract. Otherwise it would not explain, but contradict "and change the contract which the parties have made, sub- "stituting for it another and a different one which they "did not make. To establish such inconsistency it is not "necessary that it should be excluded in express terms. It "is sufficient if it appears that the parties intended to be "governed by what is written and not by anything else."

It was said in the case of Moran v. Prather, 23 Wallace (U. S. Supreme Court) 492, at page 503:

"Usage cannot be incorporated into a contract which "is inconsistent with the terms of the contract; or, in other "words, where the terms of the contract are plain, usage "cannot be permitted to affect materially the construction "to be placed upon it; but when the terms are ambiguous, "usage may influence the judgment of the Court in ascer- "taining what the parties really meant when they employed "those terms."

We take the following observations from the case of Bliven et al. v. New England Screw Company, 23 Howard (U. S. Supreme Court) 420, at page 431:

"But parol evidence of custom and usage is not admit- "ted to contradict or vary express stipulations or pro- "visions restricting or enlarging the exercise and enjoy- "ment of the customary right. Omissions may be supplied "in some cases by the construction of the custom, but the "custom cannot prevail over or nullify the express pro- "visions and stipulations of the contract. 2 Add. on Con. "970. Proof of usage, says Mr. Greenleaf, is admitted either "to interpret either the language of the contract or to sus- "tain the nature and extent of the contract in the absence "of express stipulation and where the meaning is equivocal "or obscure."

Under the authority of these cases, three decided by the Supreme Court of the State of Washington, and three decided by the Supreme Court of the United States, we believe the trial Court committed error in receiving the evidence of Mr. Baillie to the effect that custom or usage in the Port of Seattle varied and changed the clear and plain meaning of the words used by the parties to the contract. These cases can be multiplied without end, but we believe the citations given and the authority thereof are sufficient to show the error of the lower Court.

SPECIFICATIONS OF ERROR EIGHT AND TWELVE

All that has been said relative to specification of error 7 applies with equal force to specifications of error 8 and 12, for the testimony of the witnesses A. H. P. Jordan (transcript of record, page 61) and William Howarth (transcript of record, page 63) was practically the same as that given by Mr. Baillie, and sought to explain the custom of the Port of Seattle in relation to the word "delivery" as used in the contract. The additional argument may be made against the admission of the testimony of these gentlemen, inasmuch as they testified as to a custom which existed in relation to the conduct of their own business in their own factory, and did not attempt to make the custom a general one existing in the Port of Seattle.

SPECIFICATION OF ERROR THIRTEEN

Specification of error 13 is as follows:

"That the said Court erred in overruling and denying "the motion made by counsel for plaintiffs in error at the "close of the testimony for judgment on the pleadings, "and also for verdict and judgment upon the case upon "the following grounds:

"1. That the defendant had pleaded in its answer and "its evidence proved that it had accepted 861 casks of the "clay, which conformed to the sample submitted, and that "it had rejected 739 casks, which were alleged to be inferior "to the said sample. That under the pleadings and the "evidence and where a contract for the sale of personal "property is entire the defendant will not be allowed to "accept performance of a part of said contract and reject "performance of another part.

"2. That under and by the pleadings the defendant has "not counter-claimed for any damages sustained by reason

"of the alleged breach of warranty, and hence none can be "allowed to it."

Without in any way whatsoever detracting from the earnestness with which we have urged our other specifications of error, we desire to submit that the most grievous and serious error committed by the Court was in overruling the motion above set forth. We wish to discuss this specification of error at greater length than have we the others, and to cite more authorities, for the points presented here raise a question of law which has been passed upon by various supreme courts, and we submit that the adjudicated cases show that we are correct in our position upon this appeal, and that the trial Court committed a reversible error. To make our argument clearly understandable we wish to refer to the complaint filed in this case (transcript of record, page 2) wherein, after the formal allegations, the plaintiffs in error say that on the 15th day of October, 1906, plaintiffs and defendant entered into a certain contract in writing wherein the plaintiffs agreed to sell and the defendant agreed to accept 300 to 400 tons of China clay of the brand known as P. X. Y.; the contract further providing that delivery was to be taken by the purchaser ex ship and from alongside vessel at once on discharge at Seattle, Washington, such clay to be at the risk of purchasers, and wharfage, if any, at Seattle, Washington, to be for the account of the purchaser. That under and by the terms of the contract the plaintiffs shipped 400 tons of China clay, which was discharged at the dock of Galbraith-Bacon Company at Seattle, and that the defendant, pursuant to the contract, took delivery from alongside said ship and ex said ship at Seattle. Where-

fore, plaintiffs demanded judgment for the purchase price. Thereafter the defendant, Everett Pulp & Paper Company, filed an answer denying the material allegations of the complaint, and for a further answer alleged that on the 11th day of October the defendant purchased 300 to 400 tons of P. X. Y. China clay ex ship at Seattle, Washington. That said clay was discharged at the Galbraith-Bacon dock and forwarded by the defendant in error to Everett, Washington, where, upon inspection, it was found that 861 casks conformed to sample of P. X. Y. brand, and that 739 casks were of an entirely different brand, and inferior to the sample submitted. That immediately upon the discovery that there was included in the said shipment of clay casks of a different and inferior quality *the defendant notified the plaintiffs and refused to accept the shipment.* By paragraphs V and VI of the further answer the defendant in error alleged that it rejected the 739 casks inferior to sample, and was ready and willing to return the same to the wharf in the City of Seattle, and that they accepted 861 casks, for which they tendered payment. A reply was filed denying the material allegations of the answer.

We desire to divide the argument under this specification of error into the following sub-headings:

1. Judicial interpretation of the words "ex ship" and discussion of the place of delivery.

2. Where a contract is entire and delivery has been made a vendee will not be allowed to accept a part of the goods delivered in performance of the contract and reject a part, but on the contrary, the whole must be accepted or the whole rejected.

3. Where goods are rejected under a contract, or there is an attempt at rescission of the contract, a subsequent retention of the goods and their use implies a waiver of the rejection or rescission, and the law presumes an acceptance of the goods furnished under the contract.

4. Under the pleadings in this case defendant is entitled to nothing by way of counter-claim or recoupment.

Taking up our subdivisions in the order named, we have:

1. Judicial Interpretation of the Words "Ex Ship," and Discussion of the Place of Delivery.

The written contract between these litigants called for delivery of clay from alongside said ship and "ex ship" at Seattle, Washington. We have searched the books carefully for the interpretation of the words "ex ship," and we cite the only two cases we have found to this honorable Court.

In the case of Harrison v. Fortlage, 16 Supreme Court Rep. 488, 161 U. S. 57, there was a contract between plaintiff and defendant calling for a shipment of sugar from the Philippines to Philadelphia, price per ton ex ship. The Court said, speaking through Justice Gray:

"The words 'ex ship' are not restricted to any particu-
"lar ship and by the usage of merchants, as shown in this
"case, simply denoted that the property in the goods so
"passed to the buyer upon their leaving the ship's tackle,
"and that he shall be liable for all subsequent charges of
"landing. They do not constitute a condition of the contract,
"but are inserted for the benefit of the seller." The Court

cited the case of Neill v. Whitworth, 18 B. C. (N. S.) 435, which case we have had no opportunity to examine.

The second of the cases interpreting this expression is the case of Tinsley v. Weidinger, 8 N. Y. Supp., page 476, wherein there was a bill of sale of 500 to 600 tons kainit, in blank * * * * delivered ex vessel in New York harbor. The Court, in its opinion, said:

"In the case at bar the contract provides that the kainit "shall be 'delivered ex vessel in New York harbor.' I see "no other possible way of construing this contract than to "hold that it was made an integral part thereof that the "merchandise shall be delivered, not in Germany, but at "New York. (In commenting on the case of Heller v. Man- "ufacturing Company, 39 Hun, 547, the Court continued.) "In the Heller case the word 'delivery' is used in two differ- "ent significations—a legal sense and a colloquial sense. "In one case it stands for assumption of legal control, in "the other for the beginning of physical possession. But "inspection of the whole instrument in the Heller case "shows the intent to deliver, in the legal sense of the word, "in the port in Germany. A similar inspection of the "entire contract in the case at bar discloses an intention "that 'delivery' in the legal sense and in the popular sense "of transfer of physical possession should be simultaneous "and should both take place at the Port of New York. "This obvious meaning of the language is further borne "out by the clause that 'buyers shall furnish vessel at New "York to carry the goods to Richmond.' Evidently the "intention was that the vendor was to deliver the goods in "New York and that there, although they had not arrived "at their ultimate destination, the vendee was to accept "them and assume all further charge and risk."

Passing on to the allied question under this point, as to the place of delivery, we respectfully refer the Court to

the case of Lawder & Sons Co. v. Mackie Grocer Co., 54 Atl. at page 634, wherein we quote the syllabus of the Court, where it is said:

"Where a contract of sale, in terms free from doubt, "prescribes the place of delivery of the goods it must gov- "ern the rights of the parties and collateral circumstances "will not be considered to arrive at a different construc- "tion."

In the case of Altman et al. v. Nilson, 84 N. W. (Iowa) 692, the question of delivery was discussed by the Court in the following language:

"The facts which we have set out above are undisputed, "and based upon them the defendant urges that the sale "was not completed because no acceptance of the order is "shown, and, further, because there was no delivery of the "machines to him. There was no provision in the contract "requiring any action on the part of the plaintiff to make "the transaction a completed sale, and upon delivery of "the machines to the defendant it was completed, so that "a rescission could not be made—if, indeed, it could have "been made at any time after the contract was signed. "That there was a sufficient delivery in this case we do "not doubt. It was clearly the intention of the parties "that the title should pass at the time, and in pursuance "of such intention the defendant immediately exercised "ownership thereover by his arrangement with Mr. "McKinley. This, under the circumstances, constituted a "complete delivery and acceptance of the machines. Brown "v. Wade, 42 Iowa 650; Barrows v. Harrison, 12 Iowa "588; 21 Am. & Eng. Enc. Law 550, 553, and cases cited."

We ask the particular attention of the court to the applicability of the just cited cases to the one at bar. Under the terms of the contract here the parties voluntarily named the place where delivery should be made imme-

diately ex ship and from alongside vessel. The Everett Pulp & Paper Company, in pursuance of the contract, not only took delivery at the place so designated in the contract, but exercised absolute ownership and control over the goods so accepted by them and sent them to another town, namely, Everett, Washington, where their manufacturing plant was situated and thirty miles from the place of delivery. We submit that this constituted an acceptance of the goods under the contract. For supposing the goods, in the course of trans-shipment from Seattle to Everett, were lost through a train or shipwreck, there could be no question but what the Everett Pulp & Paper Company had accepted delivery of the goods so as to make them liable for the entire purchase price. We submit that contracting parties may nominate a place where delivery is to be made, and that if delivery is made at that place the conditions of the contract have been fulfilled.

We also refer this honorable Court to the case of Houdelette v. Dewey, 86 N. E. 790, where the Court said:

"The plaintiff engaged to import the beams and deliver "them to the New England Structural Company, by whom, "under separate contract with him, they were to be wrought "into the desired shape. But in fact their works were at "Everett, and as the company refused to accept the deliv- "ery of the beams at the wharf the plaintiff, having paid "for transportation to the works for all the shipment, "demanded reimbursement. The defendant's agreement "with the company does not appear, nor is it important, "but upon recurrence to the contract the plaintiff became "bound to deliver only 'at Boston,' the place designated "by the buyer, and when the beams were landed on the "wharf and the company notified, they had performed their

"contract and the title then passed to him." Citation of authorities.

See also the case of White v. Harvey, 27 Atl. (Maine) 106, where the Court made the following comment:

"But to return to the question of acceptance before "suit brought. It is a general principle affecting this "subject that whenever personal property is sold, deliver- "able to a particular person or at a particular place for "the buyer, a delivery to such person or at such place is "a completed delivery to the vendee. 'The cases are numer- "ous,' said Whitman, C. J., 'which show that a delivery of "an article sold to a person appointed by the vendee to "receive it is a delivery to the vendee.' Wing v. Clark, 24 "Me. 366. The same rule attaches where the delivery is to "be at an agreed place. Means v. Williamson, 37 Me. 556. "The precise rule, as stated in several cases in Massachu- "setts, is that 'in an action for goods sold and delivered, "if the plaintiff prove a delivery at the place agreed, and "that there remained nothing further for him to do, he "need not show an acceptance by the defendant.' Nichols "v. Morse, 100 Mass. 523; Brewer v. Railroad Co., 104 "Mass. 593; Rodman v. Guilford, 112 Mass. 405. Discus- "sion in other cases serve to illustrate this rule." Citation of authorities.

"The delivery at a place agreed is for the buyer's accom- "modation. Instead of his taking the goods they are sent "to him at his direction. Then the seller's responsibility "is ended, and an acceptance is implied. The buyer, in "effect, agrees that such delivery shall operate as a com- "plete transfer of the property."

See also 35 Cyc. 187 and cases there cited.

The change of possession also constitutes acceptance of delivery.

84 N. W. 692.
35 Cyc. 504.

2. Where a Contract is Entire, and Delivery Has Been Made, a Vendee Will Not be Allowed to Accept a Part of the Goods Delivered in Performance of the Contract and Reject a Part, but on the Contrary the Whole Must be Accepted or the Whole Rejected.

We believe that the authorities cited under this subheading are so clear and convincing as sustaining the proposition of law which we herein set forth that the error of the trial Court will be manifest. The defendant in error will be bound by its pleading, and for the purpose of the argument hereunder we will briefly set forth the sense of the answer filed.

By the further answer and defense (transcript of record, pages 7, 8 and 9) the defendant in error admitted the execution of the contract and that 400 tons of China clay were delivered on the Galbraith-Bacon dock at Seattle. That the clay was there accepted and transported to the defendant's plant at Everett, Washington, where upon an examination 861 casks conformed to sample and 739 casks did not. By paragraph II of the further answer (transcript of record, page 8) the defendant in error pleaded that immediately upon the discovery that the clay was a different brand the plaintiffs were so notified and the *defendant refused to accept the shipment. Thereafter the defendant accepted a portion of the shipment, for which it tendered payment and rejected 606 casks which were claimed to be inferior to the sample.* Such a mode of procedure as adopted by the defendant in error will not be countenanced in the law, for where a contract is entire, incapable of division into its various elements and a consideration set forth for each element, acceptance must be of the whole or rejection must be of the whole. One will

not be allowed to accept that portion of the contract which is pleasing to him (the consideration of the contract being entire and going to the whole contract) and reject another portion which is displeasing. The defendant, by paragraph II of the further answer, pleads *that it rejected the entire shipment, and then subsequently by paragraphs III, IV and V of the further answer, that it accepted a portion of the clay and rejected a portion.* There is nothing in this record to show that such a procedure was ever acquiesced in by the plaintiffs in error, but on the contrary, we find upon examination of defendant's exhibit No. "5" (transcript of record, page 39), which is a letter written by the plaintiffs in error to the defendant in error, that the plaintiffs in error insisted at that time that the defendant in error must pay for the entire shipment as the same had been received and accepted by it. There is no subsequent agreement shown or attempted to be shown wherein the plaintiffs in error allowed the defendant in error to use that portion of the shipment which they pleased and to throw out the rest.

The question presented here has been settled by the Supreme Court of the State of Washington, wherein this trial Court is situated, in the case of Buckeye Buggy Co. v. Montana Stables, 43 Wash. 49 (1906), 85 Pac. 1077, and 17 American State Rep. 1032, wherein the Buckeye Buggy Company of Ohio sold to the Montana Stables of Seattle a brougham for $900 and a coach for $700. Thereafter the two vehicles were shipped to Seattle, when the Montana Stables accepted the coach but rejected the brougham, alleging that the same did not conform to the specifica-

tions. The Court, in speaking upon the question under consideration, said:

"If the contract in suit was entire, and parol testi-"mony incompetent to explain the consideration, the judg-"ment must be affirmed, as an acceptance of one vehicle "would in law be equivalent to the acceptance of both. If, "on the other hand, it was competent for the appellant to "show that the contract was in fact severable, the judg-"ment must be reversed, as a sufficient deviation from the "written contract was alleged to warrant the appellant in "refusing to accept the brougham. *We believe it to be a "rule that, if several articles are sold for a single and "entire consideration, without any apportionment of the "purchase price as between the several articles, the con-"tract of sale is entire and cannot be severed, except by "agreement of the parties.*"

The Court then reviews the authorities to sustain this proposition.

We believe this case to sustain the proposition for which we are contending; and that inasmuch as it cannot be claimed that the contract in the case at bar was severable and the consideration capable of being apportioned to each cask of clay, the case cited is controlling in this instance.

We desire to cite the case of Manss-Bruning Shoe Mfg. Co. v. Prince, 41 S. E. (West Virginia, 1902) 907. We ask the indulgence of the Court in citing this case at length, for the questions there raised and decided are analogous to those at bar. In this case the plaintiff, the shoe manufacturing company, entered into a contract with Prince, the defendant, to manufacture a certain lot of shoes to be delivered by March 15th. The shoes were not delivered until April, but when they were so delivered the

defendant took the shoes to his store, and then on April 15th wrote declining to accept the shoes and informed the plaintiff that the shoes were held for its order. Thereafter Prince opened the shoes and selected therefrom those shoes which he was willing to take and rejected the balance. The shoe manufacturing company did not accept such new arrangement, but brought an action for the entire purchase price. We quote at length from the opinion of the Court, for the reasoning and the authorities are peculiarly applicable to the case at bar.

"The shoe company did not indicate any willingness "for Prince to keep part of the goods. Common sense, "common justice, say that he could not keep part of the "goods without the seller's consent. This letter shows that "Prince knew this. On May 6th, Prince again wrote the "shoe company, stating that he had written it on 26th "April that the shoes were behind time and not up to "sample; but he kept the goods in his store fourteen days "after taking from the depot. Did he expect some abate- "ment in price, or that he would be allowed to keep part "of the goods? Why not ship back? On 8th May the shoe "company wrote him in reply that the company had writ- "ten him, explaining delay in shipment; that he was to "notify them when to go to work on the shoes, and insist- "ing that the shoes were even better than the samples, and "that the agent would soon see him and explain matters "more fully; *but it neither agreed to take the goods back, "nor allowed him to keep only a part of them. What did "he do on receipt of that letter? Did he return the goods "as received? Not at all. His own evidence says, 'After "receiving that letter I looked over the goods, and kept "just as many as I could use, and sent the rest back.' This "decides the case for the plaintiff. A purchaser saying he "countermands an order, yet taking possession of the goods, "selecting a part to keep, a part to return. A purchaser "who says the delivery is too late, yet does these things. A*

"purchaser who says some of the goods are inferior sends "back the inferior part and keeps the part up to sample, "as he himself admits he did do. The positions are utterly "inconsistent, unjust, and therefore not allowed by law. "Prince put, as he admits, $130 worth of the goods out of "$473.50, the total value of them, upon his shelves, and "sold them. Where did he get the right to do this? Not "from the plaintiff. *Receipt of goods by a buyer will be "a binding acceptance 'if any act be done by the buyer "which he would have no right to do unless he were owner "of the goods.'* Benj. Sales, 521. 'The buyer will also lose "his right of returning the goods delivered to him under a "warranty of quality if he has shown by his conduct an "acceptance of them, or if he has retained them a longer "time than was reasonable for trial, or has consumed more "than was necessary for testing them, or has exercised own-"ership, as by offering to resell them.' Here Prince sold "part of the goods as his own. *Ratification of a part of a "contract is ratification of the whole.* 7 Am. & Eng. Enc. "Law (2nd Ed.) 144. In Maynard v. Render, 23 S. E. "194, the Supreme Court of Georgia puts clear law in say-"ing, 'They could have repudiated the entire agreement "and rejected the whole (cordwood sold); but, having "elected to accept a portion, they are bound by their elec-"tion and must receive all.' Tiff. Sales, 111, says: 'If the "party has enjoyed part of the consideration there can be "no rescission;' and, 'If the failure is merely as to quality "of a part of the goods, the buyer cannot rescind unless "he rescinds in toto.' Clark, Cont. 350, says: 'The con-"tract must be rescinded in toto. It cannot be rescinded "in part.' Our own case of Thompson v. Douglass, 35 W. "Va. 337, 13 S. E. 1015, shows that acts of ownership over "property by a purchaser bind him to a contract. 'If one "with knowledge of a fraud which would relieve him from "a contract goes on to execute it he thereby confirms it, "and cannot get relief against it. He has but one elec-"tion—to confirm or repudiate the contract; and, if he "elects to confirm it, he is finally bound by it.' Hutton

"v. Dewing, 42 W. Va. 691, 26 S. E. 197. So here. *"Prince knew of his letter of countermand, of the late-"ness of delivery, and of the quality of goods; and he "could not, without binding himself irrevocably for the "price of the goods, take them from the depot, open them, "and much less keep part.* When Prince took part of the "shoes out of the lot to keep he knew that the shoe com-"pany would hold him to his contract, because he says that "when he had its letter of 8th May telling him so. He did "this with his eyes open to its claim to hold him to his "contract. How can he talk about inferiority of the goods "when, for instance, as he admits under oath, out of a lot "of six pairs of fine shoes he kept one for his own wear "and sent the remaining five pairs back? They were of the "same quality.

"Under these principles, the Court erred in giving the "instruction asked by defendant, that 'the fact that the "firm of Ash M. Prince retained and kept a part of the "shoes referred to in this case does not of itself constitute "an acceptance of the shoes returned by him.' For the "same reasons, it was error to refuse the six instructions "asked by plaintiff. They are somewhat repetitions, but "put the law properly. *They are, in effect, that if the "shoes were received by Prince and taken to his store, and "Prince accepted the shoes, or any part of them, and kept "such part, or did any act as to such part as the owner "thereof, the firm was liable for the whole price.* It was "error not to exclude from the consideration of the jury "all evidence of Prince and Noble as to the countermand "of the order, and as to date of delivery as too late for "spring trade, and of the quality of the goods. It is proper "to add that this case does not in the least, as to matters "above considered, depend on conflicting evidence or weight "of evidence, or its effect or credibility. The facts above "stated are not contested. I have not considered anything "as to which conflict of evidence exists. In fact there is "no conflict of any import. This being so, the Court does "not invade the province of a jury, but holds that upon

"the undisputed, fixed facts the verdict is contrary to the "law arising on those facts. This is very different from "the case where the Court has to find facts on evidence, or "on conflict of evidence, differently from the jury. A Court "must set aside a verdict contrary to law on fixed facts. "Miller v. White, 46 W. Va. 68, 33 S. E. 332, 76 Am. St. "Rep. 791; Grayson's Case, 6 Grat. 712."

We cannot pass without calling to this honorable Court how strangely analogous are the facts of the case just cited and the case at bar and the sane and sound reasoning of the Court in arriving at the conclusion that the plaintiff manufacturing company was entitled to recover the entire consideration of the contract. We quote from the opinion rendered in the case at bar by the trial judge in the lower Court, where he says: "On the contrary, it (the defendant "in error) was prompt in giving notice to the plaintiff of "the inferior quality of the clay and has acted fairly "toward them in minimizing the loss by making use of and "tendering payment for all of the clay fit for use and by "holding the rejected portion subject to plaintiffs' right to "dispose of it. The plaintiffs' contention is founded upon "the false idea that the defendant was legally bound to "either accept the commodity of which delivery was "tendered and pay the contract price for all of it, regard- "less of its quality, or else refuse to receive possession of "it. This idea is contrary to the rule of law applicable to "the case, because it ignores the implied warranty upon "which the defendant had a right to rely."

The opinion of the trial judge is directly opposed to the opinion just cited of the Superior Court of West Virginia, and we submit that the contention of the plaintiffs in error is not based upon a "false idea," as classified by the

trial judge. The defendant in error accepted delivery of the clay at the wharf, and at the place nominated for delivery in the contract, assumed undisputed ownership by shiping the same to its plant at Everett, Washington (admitted by its answer), and the further undisputed evidence shows that it used about one-half of it. We cannot understand any reasoning other than that this was an acceptance of the performance of the contract on the part of the defendant in error, and if the plaintiffs in error did not provide clay of the P. X. Y. brand the defendant in error had the right to counter-claim for the damages by a formal pleading on the breach of the warranty, a thing which it did not do.

In the case of Avery Mfg. Co. v. Emsweller, 67 N. E. (Ind. 1903) 946, the defendant purchased threshing machinery, and he took delivery at the place named in the written contract. He afterwards removed one part of the machinery, leaving the remainder where he had accepted delivery. The Court held that an acceptance of one portion of the outfit purchased was acceptance of the whole, and entitled the seller to the entire purchase price.

In the case of Crane Co. v. Columbus Construction Co., 73 Fed. 984 (1896), without attempting to cite the facts we give this extract from the opinion of the Court:

"It is not a case of rescission. That requires the plac-
"ing of both parties in *statu quo*. * * * * But upon the
"hypothesis of the proposed instruction, which, together
"with the evidence offered in support of it, ought, as we
"think, to have been submitted to the jury, it is simply a
"case where, under a contract of sale which is executory
"and entire, the vendee repudiates the contract in respect
"to a part of the goods, and in respect to the remainder

"seeks to enforce it—a proposition which, we think, is sup-
"ported neither by reason nor precedent."

The Federal Court then reviews the authorities which clearly sustain the rule of law, as announced by the Court.

In the case of Reynolds v. Palmer, 21 Fed. Rep., page 433, the Court held that where a contract is rescinded it must be rescinded as to the whole subject matter and the parties placed in *statu quo,* and that a vendee will not be allowed to accept a portion of the goods under an entire contract and reject a portion.

In the case of Lyon v. Bertram, 20 Howard (U.S.), page 149, there was a sale of a cargo of flour at a fixed price per barrel. The Court held that where a contract is to be rescinded at all it must be rescinded in toto and the parties put in *statu quo.* And, further, that the purchaser cannot rescind the contract as to a portion thereof and accept as to another portion. "It cannot be rescinded in "part and enforced in part."

In the case of Morse v. Brackett, 98 Mass. 205, the plaintiff was a wool factor and had in its store a separate lot of eight bags supposed by him to contain combings pulled wool, each of which was marked "Parsons," with a black line drawn about the word so as to enclose it within a parallelogram. The defendant, being a manufacturer, inquired for wool of this description and was sold these eight bags by plaintiff's salesman. Defendant purchased the eight bags, the entry on the charge being 'eight bales pure combings pulled wool.' When the bags were opened the defendant found that one of them contained only a very small portion of combings pulled wool. He

refused to receive the same and returned it to the plaintiff. The plaintiff asked for the instruction that the contract was an entire contract and that the defendant had no right to rescind it as to one bag and affirm it as to the others, but if he wished to avail himself of the defense set up he should have returned, or offered to return, the entire lot. The Court, speaking through Chief Justice Bigelow, said:

"This case comes within the former principle that no "contract can be rescinded unless both parties are restored "to the condition in which they were before the contract "was made. One party cannot insist on the validity of a "contract as to one portion of the subject matter and claim "to set it aside and avoid it as to the remainder. The ven- "dee of a specific quantity of merchandise sold under an "entire contract cannot retain a portion to his own use "and return the remainder to the vendor. If he receives "and holds a part he will be liable in assumpsit for the "whole. If, on the ground of fraud or breach of warranty "or for other reason, he seeks to rescind the contract he "must return the whole of the merchandise."

In the case of Clark v. Baker, 46 Mass. 452, the plaintiff purchased a cargo of corn from the defendant, agreeing to pay 76½ cents per bushel for the yellow corn and 72½ cents for the white corn, the defendant warranting it to be of a certain quality. The schooner went to plaintiff's wharf and the plaintiff received a part of the cargo and refused to receive the balance, stating that the corn did not conform to the warranty. The question arose as to whether or not the contract was entire or severable. We commend this case to the Court as a full treatise upon the law of entire and severable contracts. The Court held that the contract was entire and was incapable of division, and

that if the plaintiff accepted a portion he was then legally bound to accept the whole. How much stronger is the case at bar than the one just cited. The contract provided for the purchase of two different kinds of corn, the yellow kind at a certain price and the white kind at a different price. By a strained construction the Court could have found that the consideration for each kind of corn so purchased could be separated and made distinct from any other consideration therein named, and could have held the contract divisible on those grounds, and by virtue of which the plaintiff could have accepted a part and rejected a part. But this was not the conclusion of the Court, and we submit that the case at bar is much stronger inasmuch as one price was fixed for the entire shipment of clay, and we believe that no rule of law or adjudicated case will be found as authority for dividing the contract in the case at bar and allowing rejection of a part and acceptance of a part.

In the case of Sigerson v. Harker, 15 Mo. 70, the Court said that where a contract is entire it would be manifestly unjust for the vendee to select such as he supposed corresponded with the warranty and return the remainder.

The following cases also clearly enunciate the same rule:

Marvin v. Brewster Iron Mining Co., 56 N. Y. 671.
Junkins v. Simpson, 14 Maine 364.
Harzfeld v. Converse, 105 Ill. 534.
Kimball v. Lincoln, 7 Ill. App. 470.
Inwack v. Cruse, Wils. (Ind.) 320.
Miner v. Bradley, 39 Mass. 457.
Burnett v. Stanton, 2 Ala. 183.
35 Cyc. 139 and cases there cited.

See also the extended note upon this question to the case of Huyett & Smith Co. v. Chicago Edison Co., 59 American State Rep. 272, at page 277.

3. Where Goods are Rejected Under a Contract or there is an Attempt at Recission of the Contract, a Subsequent Retention of the Goods and Their Use Implies a Waiver of the Rejection or Recission, and the Law Presumes an Acceptance of the Goods Furnished Under the Contract.

We believe that the above is a statement of the law which is not only borne out by adjudicated cases but by common sense reasonably applicable to mercantile transactions. If, after a vendee accepts delivery of chattels under a contract and thereafter attempts to rescind the entire contract and then later uses the goods, or a portion thereof, it is reasonable to believe that the vendee has reconsidered the attempted rescission and then takes acceptance of the goods, and that the former position of rescission is abandoned and no longer relied upon. This ought to be a rule of law applicable to business transactions, and we believe the same to be recognized by the books.

In the case of Dodsworth v. Hercules Iron Works, 66 Fed. Rep. 483, the Court said:

"The right of rejection was lost by the long continued "use of the machine, which was entirely inconsistent with "the purpose to resort to the first remedy which was open "to them and consistent only with a claim of title and "ownership." Citation of authorities.

In the case of Gale Sulky-Harrow Mfg. Co. v. Moore, 26 Pac. (Kans.) 703, there was a contract with a warranty for the sale of a farming implement. The implement was

delivered and plaintiff rejected it, saying it did not conform to the warranty. However, he used it for a part of his farm work. The Court said:

"If Moore decided to rescind, it was his duty to place "plaintiff in *statu quo* as nearly as possible, and therefore "he should have returned, or offered to return, the imple- "ment unless it was wholly worthless to both parties. From "the testimony it cannot be said that it was valueless, and "neither could it be said that there was a rescission. In "order, however, that the purchaser be entitled to rescind "the contract he must return the property, or offer to "return it, within a reasonable time. He cannot retain "and use the property and at the same time state he repu- "diates and rescinds the contract of purchase."

In the case of Buckstaff v. Russell, 79 Fed. 611, suit was instituted by the plaintiff to recover the price of certain machinery sold to the defendants under a contract with a warranty. After delivery of the machinery the defendants notified the plaintiff that they refused to accept the same, but later made use of the machinery. The Court held that the attempted rescission was not available to the defendants inasmuch as the machinery was used after the rescission, and that the attempted rescission would be presumed to have been abandoned, and the defendants accepted the same in compliance with the contract.

In the case of Brown v. Foster, 15 N. E. 608, there was a contract with a warranty for the sale of machinery. After the machinery was delivered defendant notified the plaintiff that he rejected the same, but thereafter used the machinery in his business. The Court said:

"Non-payment after the performance of the vendor "was a breach of the vendee's agreement, and upon that

"the action was well brought. It is true the vendee said, " 'I will not accept,' but this was of no consequence after an "opportunity to inspect and with full knowledge of its "quality, he still not only retained the machinery but "enjoyed the benefits of its use. That act was one of own- "ership and completed the transaction, and the transmuta- "tion of property from the vendor to the vendee was final. "The contract then became the only measure of the defend- "ant's right or the plaintiff's liability."

We have no desire to weary the Court by amplifying at length the authorities already cited herein, but will simply refer to the cases that have adjudicated this point, so that this honorable Court may consult the same if it so desires.

Hallwood Cash Register Co. v. Berry, 80 S. W. (Tex.) 857, and cases therein cited.
Libby v. Haley, 39 Atl. 1004.
Lenz v. Balke, 44 Or. 569.
Tiedman on Sales, Sec. 197.
Drake v. Sears, 8 Or. 209.
Schumann v. Wager, 36 Or. 65.
Dean Pump Works v. Astoria Iron Works, 40 Or. 83.
Leggett & Myers Tobacco Co. v. Collier, 56 N. W. (Iowa) 417.
Eagle Iron Works v. Des Moines Suburban Railway Co., 70 N. W. (Iowa) 193.
Detroit Heating and Lighting Co., v. Stevens, 52 Pac. (Utah) 379.

4. Under the Pleadings in This Case Defendant is Entitled to Nothing By Way Of Counter-claim or Recoupment.

The question presented under this sub-heading is one of pleading. We would again respectfully refer this Court to the further answer and defense of the defendant in

error (transcript of record, pages 7, 8 and 9). We submit that when chattels are sold under a warranty and the delivered article does not fulfill the warranty, the vendee has an election of remedies as follows:

1. To rescind the contract in toto, if it be entire, for failure of consideration.

2. If the purchase price has been paid, to sue the vendor for damages arising from the breach of the warranty.

3. If the vendee is sued by the vendor for the purchase price, to set up the warranty and the breach thereof and *counter-claim* for the damage sustained.

None of these things were done by the defendant in error, and the only course open to it, under the rule of pleading and law, was to set up a counter-claim for the damages sustained by it because of the non-compliance of the delivered clay with the warranted quality. Defendant in error has not counter-claimed for the damages, as even a hasty reading of the further answer will show, but has merely set up the breach of the warranty and a partial rescission of the contract as a defense. The defendant in error has claimed no damages, has not asked for any, and we submit, under the pleadings herein, none can be allowed to it. If the defendant had counter-claimed for the damages it sustained, and properly pleaded such counter-claim, and properly alleged its damages, then an issue would have been presented in this case, as to the amount of the damages, but no such pleading was adopted by the defendant in error and no such issue was raised or presented therein. We, therefore, submit that the trial Court committed an error when it awarded damages to the defendant in error, there being no issue upon which to make such a finding.

We would call the particular attention of the Court to the case of Nash v. Weidenfeld et al., 58 N. Y. Supp. 609, at page 611, where it is said:

"But the contract contains a warranty that the prop-
"erty delivered shall be of a certain quality, and where
"such a contract is made the right to recover damages for
"a breach of it survives the acceptance of the property.
"Such a right, however, is not a defense to the action after
"acceptance of the goods, but is a counter-claim for the
"breach of the contract of warranty (Norton v. Dreyfuss,
"106 N. Y. 90, 12 N. E. 428); and, to enable the party com-
"plaining of it to recover upon it, it is necessary that he
"should allege not only the facts constituting the breach
"of the warranty, but also the fact that he has suffered
"damage on account of it. Nothing of that kind appears
"in this pleading. So far as can be inferred from it, it was
"not intended to be a counter-claim, but it is set up as a
"*'further defense,'* and there is in it no statement that the
"plaintiff has suffered any damages by reason of the failure
"of the Shelby Steel-Tube Company to perform its con-
"tract, and no claim for affirmative relief whatever. *But*
"where one is called upon to set up an answer which is
"available only as a counter-claim he is bound to plead it
"in explicit terms and not leave it to inference, whether he
"intends or not so to plead it (Rice v. Grange, 131, N. Y.
"149, 30 N. E. 46); and if he fails to plead it as it ought
"to be pleaded and the objection is properly taken at the
"trial, he cannot complain if the Court holds him to the
"pleading which he pretends to make.

"In any aspect of this case, the answer was entirely
"insufficient, even if it should be conceded that the defend-
"ants were in a situation to set up a defense against the
"plaintiff as the owner of this note."

The case just cited more clearly states the law applicable to the one at bar than we can hope to do, and sets forth our position, under this sub-heading and upon this

writ of error precisely as we wish it understood. In the spirit and language of the case just cited, even though the Everett Pulp & Paper Company had a right to counter-claim against Meyer, Wilson & Company for the damages it sustained by reason of the breach of warranty, yet that counter-claim must be pleaded with particularity and be specifically alleged, and a prayer must be attached asking for affirmative relief. None of these things were done in defendant's answer, but it says (transcript of record, page 7), *"and further answering the complaint and by way of "an affirmative defense, this defendant alleges."* And at the conclusion of its answer it tenders into Court payment for the clay which it accepted and asked that the action be dismissed without further costs to itself. We do not believe that in any sense of the word this "further answer "and defense" can be looked upon as a counter-claim, and if the Everett Pulp & Paper Company has not formally pleaded a counter-claim for damages then it is reasonable to believe that it has sustained none, and that it could prove none before a court of law. We submit to this Court that it did not prove any damages sustained by it on account of the breach of this warranty. But the whole gist of the defense goes to the fact that it accepted a part of the clay for which it tendered payment, and rejected a part, throwing it back on the hands of Meyer, Wilson & Company, and refused any payment whatsoever therefor, yet in the face of this pleading and in the entire absence of any evidence of damages the trial judge, in his opinion, says (transcript of record, page 24): "The measure of "damages which the vendee may claim for breach of an "implied warranty of quality is the difference between the

"actual value of the property delivered and the higher "value of the warranted quality. * * * * In this case "the defendant having offered to return the inferior clay "and to hold it subject to disposal by the plaintiffs, the "contract price is the measure of damages which it is "entitled to recoup." We must construe the opinion of the Court as findings of fact and findings of law in the absence of any others prepared and signed by the trial Court, and here is a finding of fact and a finding of law which is wholly unwarranted by any construction of the pleadings in this case or by any interpretation of the evidence herein. The trial Court has gone further than it had a right to do and has granted to the Everett Pulp & Paper Company a relief which it did not ask for and which it did not seek. The Everett Pulp & Paper Company and its counsel considered that as a matter of law it had a right to accept a portion of the clay and reject a portion of the clay received under an entire contract, and that it would only have to pay for that portion which it received and accepted and used, and that the rejected clay could be thrown back on the hands of Meyer, Wilson & Company, and they could make the best of it. This was its complete defense. It sought no affirmative relief, did not plead for affirmative relief, yet the trial Court saw fit to grant the relief by way of damages, damages which were unsought and unasked.

As further sustaining the rule of pleading, we cite Sloan Commission Co. v. Fry & Co., 95 N. W. (Neb. 1903) 862. The Court said:

"In a suit to recover the price of goods sold and deliv- "ered where the sale was induced by statements and repre-

"sentations amounting to a warranty as to the kind and "quality of the goods, the defendant may retain them, plead "the warranty, facts constituting a breach thereof and set "up a counter-claim for the amount of his damages, which "will be the difference between the real value of the goods "and what they would have been worth if they were of the "kind and quality and in the condition represented, or he "may rescind the sale, return, or offer to return, the goods "and plead such rescission and tender as a complete defense "to the action (citation of authorities). An examination "of the answer filed in the County Court and set forth "above clearly shows that it fell far short of stating a "defense to the cause of action set forth in the petition. "It contained no counter-claim for damages for a breach "of the warranty and no allegation that the plaintiff had "rescinded the sale by returning, or offering to return, the "coffee. Such an allegation was absolutely necessary. "Without it the answer stated no defense."

In the case of Harrigan et al. v. Advance Thresher Co., 81 S. W. (Kan. 1904) 261, at page 262, the Court said:

"There is a material distinction between a warranty of "a chattel and an executed sale and a warranty that "articles to be manufactured and delivered in the future "shall be of a particular quality. In the former case the "purchaser has a right to rely upon the warranty without "examination or inspection of the article, and, therefore, "may return the article or sue for the breach of the war- "ranty, *or use it as a defense by way of recoupment.* Upon "this authority and the other cases cited in the opinion, "this being an executed sale, the appellants had the right "to retain the engine and make defense by way of recoup- "ment."

See also the case of Browning v. McNear, 78 Pac. (Cal. 1904) 722.

Vol. 19 of Enc. of Pleadings and Practice, pages 11 and 12.

Peerless Reaper Co. v. Conway, 48 N. W. (Wis.) 854.
Underwood v. Wolf, 23 N. E. (Ill.), page 598.
Smith v. Mayer, 3 Colo. 207.

SPECIFICATION OF ERROR FOURTEEN

Specification of error 14 relates to the damages which the trial Court awarded to defendant in error. The trial Court, in its opinion, made this finding (transcript of record, page 24):

"The defendant acted within its legal right in taking "possession of the clay and resisting the plaintiffs' demand "for the price of the portion inferior to the sample. In "this country the rule is well established by numerous deci- "sions of the courts, that a breach of an implied warranty "of quality entitles the vendee to retain the goods, and "when sued for the purchase price to set up the breach of "the warranty to reduce the sum recoverable by the vendor. "The measure of damages which the vendee may claim for "breach of an implied warranty of quality is the difference "between the actual value of the property delivered and "the higher value of the warranted quality; and if there "is no other evidence of value the price agreed to be paid "will be regarded as the value of the property of the quality "warranted. In this case the defendant having offered to "return the inferior grade and to hold it subject to dispo- "sition by the plaintiffs, the contract price is the measure "of damages which it is entitled to recoup."

It is agreed by the parties to this action that the contract price of the clay was 70 cents per one hundred pounds, allegation of complaint (transcript of record, page 3), allegation of answer (transcript of record, page 7). We would now refer the Court to the testimony of Mr. W. J. Pilz, either the treasurer or bookkeeper of the Everett Pulp & Paper Company, which is set forth in the

transcript of record, page 46. Mr. Pilz testified that he sold a portion of the rejected clay, one lot for $17.00 a ton, another lot for $15.00 a ton, which selling price of the rejected clay was 85 cents per one hundred pounds, which was ten cents higher per one hundred pounds than the contract price. *Yet in the light of this testimony the Court said the measure of damages is the difference between the actual value of the property deliverd and the higher value of the warranted quality, and if there is no other evidence of value the agreed price will be the measure of damages.* The testimony of Mr. Pilz seems to have been entirely disregarded by the Court, for by the testimony of the witness of defendant in error, and no attempt is made to discredit it, the selling price of the rejected clay, after the same had remained exposed in the open and in the yard some time, was ten cents per one hundred pounds higher than the alleged contract price. Conceding, for the purpose of the argument under this specification of error, that the defendant could make a valid rejection of a portion of the property delivered under the entire contract, yet it has sustained no damages for the reason that the quality of the clay delivered and rejected could have been sold for a higher price than that which was paid for it. The defendant in error was bound, under the rule of law, to minimize the damages as far as possible, and if it had proceeded to sell all the clay upon the same basis of valuation as it sold a portion, to-wit: ten cents per one hundred pounds higher than the contract price, it would have made a profit on the pretended rejected portion of the clay, hence we are unable to understand the finding of the Court, as made in its opinion, that there was no value shown of

the rejected clay, and hence the measure of damages would be the contract price. If no other error had occurred in this record, we submit that this is sufficient to reverse the lower Court. For while the trial Court stated the rule of damages to be the difference between the property so delivered and the higher value of the warranted quality, which we believe to be a correct statement of the rule of law relative to damages, yet it disregards the evidence applicable to such rule and disregards the higher value of the clay which was pretended to be rejected, and as testified to by the witness of the defendant in error, and states the measure of damages is the contract price. We feel that such a finding is wholly inconsistent with the rule of law as relating to damages as announced by the Court and the evidence applicable thereto, and just cited.

CLOSING STATEMENT

We do not believe that we can amplify this brief so as to make our position any stronger than is as already set forth herein. We have not endeavored to burden the Court with written arguments sustaining our position, but on the contrary, have chosen to cite adjudicated cases and well considered opinions, to which we believe this Court will give more attention. We submit this brief in the belief that all the evidence has been fairly quoted and all cases cited bear directly upon the points involved. We submit to this honorable Court that upon the great strength of the authorities arrayed in this brief the trial Court committed error to the great harm of the plaintiffs in error.

It is most respectfully urged by plaintiffs in error that said judgment should be reversed, with directions to the

Court below that a judgment should be directed for plaintiffs in error.

Respectfully submitted.

WILLIAMS, WOOD & LINTHICUM,
ISAAC D. HUNT,
Attorneys for Plaintiffs in Error.

PETERS & POWELL,
Associate Counsel.

Index

ARGUMENT

NO. 2023

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON, and JOHN M. QUAILE, Partners doing business as MEYER, WILSON & COMPANY,

PLAINTIFFS IN ERROR

VS.

EVERETT PULP & PAPER COMPANY,

DEFENDANT IN ERROR

Brief on Behalf of Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

J. A. COLEMAN
Attorney for Defendant in Error

Herald Press, Everett, Wash.

NO. 2023

IN

The United States Circuit Court of Appeals
For the Ninth Circuit

H. L. E. MEYER, GEORGE H. C. MEYER, H. L. E. MEYER, JR., JOHN WEDDERBURN WILSON and JOHN M. QUAILE, Partners, Doing Business as MEYER, WILSON & COMPANY,

Plaintiffs in Error.

v.

EVERETT PULP & PAPER COMPANY,

Defendant in Error.

Brief on Behalf of Defendant in Error

STATEMENT

The plaintiffs in error conduct a general exporting and importing business, and among other products handle

china clay. The defendant is operating a paper mill at Everett, Washington, and uses china clay in paper making. The purpose of the clay is to act as a filler between the wood fiber to make a smooth sheet and one that will take an ink impression without blotting. To be suitable for this purpose the clay must be of uniform white color and free from grit and sand.

The plaintiffs in error having been informed that the defendant in error desired to buy china clay suitable for use in the making of the character of paper manufactured by it, wrote the defendant on September 29, 1906 (Trans. p. 50) a letter in which they said: "referring to the cor-"respondence we have had heretofore with you regarding "china clay, we now have the pleasure of advising you "that we send you under separate cover a sample marked "'P. X. Y.' of an English China Clay which the makers "believe matches your own sample very well and we trust "that you will find it so. It is probable that we could "work your order for a quantity of not less than 400 to "500 tons of this P. X. Y. China Clay in one half ton "casks etc", to which letter the defendant in error replied on October 11, 1906 (Trans. 52.): "Please enter our order "for 3-400 tons of P. X. Y. China Clay to be fully equal "to the sample which you have submitted to us, at the "price etc." On October 15, 1906, the plaintiffs in error signed and sent the defendant in error a written memorandum which defendant in error signed and which is as follows: (Trans. 32)

"PLAINTIFFS' EXHIBIT 'A'

"ORIGINAL

"Meyer, Wilson & Co.,
"Portland, Oregon.
"Meyer, Wilson & Co.,
"San Francisco, Cal.
"Wilson, Meyer & Co.,
"Liverpool.

Received
Oct. 17, 1906.
Everett Pulp &
Paper Co.

Portland, Oregon, October 15, 1906.

"Messrs. Everett Pulp & Paper Co.,
"Everett, Wash.

"Bought of MEYER, WILSON & Co.

"Terms Nett Cash 338 Sherlock Building.

"Payable in U. S. Gold Coin
"as delivered.

"About Three Hundred (300) to Four Hundred "(400) tons of 2240 lbs. each, China Clay in casks, P. X. "Y. brand at Seventy Cents (70cts.) per 100 lbs. net "invoice weight ex ship at Seattle, Wash.

"This sale is made for shipment per 'Mozambique' from "Leith or Tyne (P. M. W. & Co. A. T.) to Seattle. Pur- "chasers to take delivery of China Clay from alongside "vessel at once on discharged at Seattle, Wash.

"Sellers not responsible for results (as affecting this "agreement) of strikes, accidents, lockouts, breakdown of "machinery, failure of manufacturers or suppliers, or any "other circumstances beyond their control.

"Contract void if vessel be lost, or for any portion or "all of the China Clay which may fail to reach Seattle, "owing to perils of the Sea, or other causes beyond seller's "control.

"This sale is based on the present tariff. Any change "in the rate of duty payable to the U. S. Government to be "for account of purchasers.

"China Clay at risk of purchasers as soon as landed.

"Wharfage, if any, at Seattle, Wash., to be for account "of purchasers. Pr. Pro. MEYER, WILSON & Co.
"approved. Alfd. Tucker,
"Sellers.
"EVERETT PULP & PAPER Co.,
"Augustus Johnson, Secretary,
"Approved. Purchasers."

"P. X. Y." brand has no defined meaning in the trade. For all that appears that name was applied arbitrarily to designate the particular sample submitted to the defendant by the plaintiffs, and there is nothing to show that the term was ever applied before or since to designate a kind or quality of clay.

Upon the arrival of the Mozambique at Seattle, the defendant did not inspect the clay to ascertain its quality before receiving it, because inspection at that time and place was impossible.

The trial court made no special findings of fact, but the general findings contained in the decision show what occurred before and after the arrival of the Mozambique. Said the court: (Trans. 22-24.)

"The contract for the sale of the clay was made by cor- "respondence between the parties and as construed by the "Court, it is a contract for a sale by sample, and there is "an implied warranty of quality corresponding to the "sample referred to in the correspondence. 15 Am. & Eng. "Enc. of Law (2nd Ed.) p.p. 1225-6. The clay was bought

"in England and transported by ship to Seattle, and there "is no dispute between the parties, as to the quantity of "the clay shipped and delivered, nor as to the contract "price which the defendant promised to pay therefor. It "is admitted also that payment of the purchase price has "been demanded and refused, except as to part, and other "jurisdictional facts are admitted. The contract, as con- "strued by the Court, obligated the defendant to receive "the clay from the ship, which condition precluded in- "spection by the purchaser before delivery. This is so for "the reason that, clay to be of the quality warranted, must "be of uniform white color and free from grit, and to "determine the quality, time, favorable conditions, and "special conveniences for testing are necessary, and these "essentials make a fair inspection while the ship is being "discharged, impracticable. The defendant did not in fact "inspect the clay to ascertain its quality before receiving "it, but afterwards ascertained that it came from two dif- "ferent sources of supply and that it is not uniform in "quality, 800 barrels thereof being inferior to the sample "and unsuitable for the defendant's use. The defendant "used and has tendered payment at the contract rate for "861 barrels, and disputes its liability to pay for 800 "barrels because of the inferior quality thereof. The "plaintiff's contention is that notwithstanding the inferior "quality of 800 barrels of the clay, the defendant accepted "delivery of the entire consignment, and by doing so "waived its right to reject any part of the same. The "defendant did not intend a waiver of its right to have "delivered that which it had agreed to buy and pay for, "viz: Clay of the same quality as the sample. On the "contrary, it was prompt in giving notice to the plaintiffs "of the inferior quality of the clay, and has acted fairly "towards them in minimizing the loss by making use of, "and tendering payment for, all of the clay fit for use and "by holding the rejected portion subject to the plaintiff's "right to dispose of it. The plaintiff's contention is

"founded upon the false idea that the defendant was "legally bound to either accept the commodity of which "delivery was tendered, and pay the contract price for all "of it, regardless of its quality, or else refuse to receive "possession of it. This idea is contrary to the rule of law "applicable to the case, because, it ignores the implied "warranty upon which the defendant has a right to rely. "The defendant acted within its legal rights in taking pos- "session of the clay and resisting the plaintiff's demand "for the price of the portion inferior to the sample. In "this country the rule is well established by numerous "decisions of the Courts, that a breach of an implied war- "ranty of quality entitles the vendee to retain the goods "and when sued for the purchase price, to set up the "breach of warranty to reduce the sum recoverable by the "vendor. 15 Am. & Eng. Enc. of Law (2nd Ed.) p. 1255; "24 Id. p. 1158; Saunders v. Short 86 Fed. Rep. 225; "Andrews v. Schreiber, 93 Fed. Rep. 367; Florence Oil & "Refining Co. v. Farrar, 109 Fed. Rep. 254. The measure "of damages which the vendee may claim for breach of an "implied warranty of quality is the difference between the "actual value of the property delivered and the higher "value of the warranted quality; and if there is no other "evidence of value, the price agreed to be paid will be "regarded as the value of the property of the quality war- "ranted. In this case the defendant having offered to "return the inferior clay and to hold it subject to disposi- "tion by the plaintiffs, the contract price is the measure "of damages which it is entitled to recoup."

ARGUMENT

The plaintiffs in error contend:

1. That the sale was not by sample, but that the letters of the plaintiffs submitting the sample and the letter of the defendant giving its order by sample were merged in the memorandum contract executed by the parties in

which no reference to the sample was made, but in which the clay to be sold was described as "P. X. Y. brand"; and hence the trial judge erred in permitting it to introduce in evidence the sample and the letters referring thereto.

2. That whether the sale was by sample or not or whether a P. X. Y. brand of clay was furnished or not, the taking of the clay from the ship was such an acceptance as bound the defendant to pay the contract price for the whole consignment.

3. That the evidence relating to the meaning in the trade of "delivery ex ship" and the evidence relating to the custom in the trade in regard to delivery of clay was improperly admitted.

4. Insufficiency of defendant's answer.

The defendant contends:

1. The sale was by sample. The term "P. X. Y." did not designate any generally recognized quality of clay among the trade or in itself convey any meaning to the defendant. The term was an arbitrary designation given to the particular sample which furnished the basis of the contract, and hence proof of the sample and the correspondence in relation thereto was not only proper but necessary.

2. Inspection of the clay at the ship's side was impossible for to use the language of Judge Hanford in deciding the case, "To determine the quality time, favorable con-

"ditions and special conveniences for testing are necessary "and these essentials make a fair inspection while the "ship is being discharged impracticable." It was therefore necessary for defendant to take the clay to its mill to test it. It had the right to accept such of it as corresponded with the sample or was suitable for its uses, and to reject the remainder and this either upon the theory that in a sale by sample there is an implied warranty that the bulk will be up to the sample, or upon the theory that the contract was not entire but divisible and that defendant was only obligated to accept such of the clay as was of the kind it had contracted for, and could reject the remainder. Hence the evidence relating to the tests, the uses to which the clay is put by the defendant, the kind that is suitable for such purposes etc. was proper.

3. The evidence relating to the custom of the trade in taking delivery of clay and in relation to the meaning of the trade term "delivery ex ship" was proper, but whether proper or not is immaterial because the trial court did not base its decision in whole or in part upon such testimony.

4. The answer was sufficient to raise all of the questions decided by the trial court; but even if this were not so it would now be deemed amended to conform to the proof.

SALE WAS BY SAMPLE

The correspondence between the parties clearly shows a sale by sample. The plaintiff's letter of September 29th

contains the statement "We send you under separate cover "a sample marked 'P. X. Y.' of an English China Clay." Nothing appears in the record to show that "P. X. Y." had any known meaning in the commercial world or in the trade or that it conveyed any meaning to the defendant. On the contrary it does appear that when the sample was received by the defendant, it tested it and found it suitable for its purposes, (bill of exceptions p. 10); and then entered its order for 300 to 400 tons of "P. X. Y." China Clay, to be fully equal to sample. (Defendant's exhibit 3 —Assignment of error No. 3). It also appears that when the clay arrived, the casks in which it was contained were not marked P. X. Y., and that the term "simply referred "to the samples of clay that had been submitted." (Bill of Exceptions p. 9). The memorandum contract entered into between the parties after the correspondence mentioned calls for "China Clay in casks P. X. Y. Brand." As "P. X. Y." had no meaning except that given to it by the parties in their correspondence, namely clay of a kind and quality corresponding to a submitted sample, it would seem that nothing could be clearer than that the correspondence is a part of the contract; or even if it is not a part of the contract, such correspondence was admissible to explain the meaning of a term used by the parties, which term without such explanation would be meaningless. In no event can it be said that the correspondence contradicts or varies the terms of the written contract.

If anything in addition to the correspondence already noted is necessary to show that this sale was by sample

it appears from the shipment itself. In addition to the fact that the clay or the casks in which it was contained was not branded P. X. Y. it is in evidence that a part of the shipment came from one mine and a part of it came from another mine and these parts differed radically and materially in the two essentials of China Clay, namely, color and amount of grit. Manifestly if one of these parts is P. X. Y. the other is not.

In a case where the seller after having shown a sample of berries contracted to sell "Standard No. 3 Berries", the Court instructed the jury in substance that if the seller at the time of taking the order for the berries exhibited samples thereof and represented that the berries purchased would correspond with such sample, and if the jury found "that defendant entered into the contract intro-"duced in evidence, and that the word 'Standard' used in "said contract does not designate any generally recognized "quality or quantity of blackberries among the trade then "they were instructed that the sample cases so exhibited "establishes the standard for the berries referred to in the "contract, and that if they should find that the black-"berries tendered by plaintiff in fulfillment of the con-"tract were inferior to those contained in said sample cans, "defendant had the right to reject the same," and this instruction was affirmed.

American Canning Co. vs. Flat Top Grocery Co., 70 S. E., 756.

EFFECT OF THE DELIVERY

The plaintiffs in error contend that whether the sale was by sample or not, and whether they furnished a P. X. Y. brand of clay or not, the defendant in error having taken the clay from the ship's side at Seattle is now precluded from making any objection to the quality of the commodity so taken by it. In other words the plaintiffs in error contend that although about one half of the clay shipped to the defendant was not what it bought and could not be used in its business, it was bound to keep the whole consignment and pay the contract price therefor. This contention ignores two elementary principles, one of which is that in every sale by sample there is an implied warranty that the goods will correspond to the sample, and the other which is more particularly applicable to this case is that when a vendor sells goods of a specified quality and undertakes to ship them to a buyer who has not seen them and delivers them in such a manner that the purchaser has no opportunity to examine them before delivery, the mere delivery does not bind the vendee to accept them; he has the right after such delivery to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject such of them as are not of the quality required by the contract. In such a case the act of refusing to accept an article as not being in accordance with the terms of a previous executory agreement is one of insistence on, and not a rescission of, the contract. This is not a case in which the buyer of a specific lot of goods accepted and

used a part of them with full means of previously ascertaining whether they conform to the contract or not. Here the quality of the commodity sold could not be ascertained at the ship's side but had to be taken to defendant's mill or some similar place to be tested. Upon making the necessary test it was ascertained that about half of the quantity delivered was in accordance with the contract or fit for defendant's uses and the other half was entirely unfit for defendant's uses and not up to the standard required by the contract. Under these circumstances the defendant certainly had the right to retain so much of the shipment as was in accordance with the contract and to reject the rest.

The propositions just stated are well supported by the authorities. The Supreme Court of the United States has said:

"The authorities cited sustain this proposition: that "when a vendor sells goods of a specified quality, but not "in existence or ascertained, and undertakes to ship them "to a distant buyer, when made or ascertained and delivers "them to the carrier for the purchaser, the latter is not "bound to accept them without examination. The mere "delivery of the goods by the vendor to the carrier does "not necessarily bind the vendee to accept them. On their "arrival he has the right to inspect them to ascertain "whether they conform to the contract, and the right to "inspect implies the right to reject them if they are not "of the quality required by the contract."

Pope vs. Allis, 115 U. S., 373.

The Supreme Court of Michigan has held that where the character of the goods purchased is such that their

quality cannot be determined by looking at and examining them, but by actual use only, the purchaser will be entitled to a reasonable time in which to test the goods, and ascertain whether they are the kind ordered; and until this question is determined the retention of the goods does not amount to an acceptance thereof.

Phil. Whiting Co. vs. Detroit White Lead Works, 24 N. W., 881.

Every person who sells goods of a certain description undertakes as a part of his contract that the article delivered shall correspond to the description and is in fact an article of the special kind and quality expressed in the contract of sale and the purchaser has a right to rely upon the undertaking that the article is of the kind or quality ordered and presume it to be true that the article is the one or kind ordered.

Bagley vs. Cleveland Rolling Mill Co., 21 Fed., 159.

The contract sued upon was not entire but severable. This court has said:

"The modern American rule seems to be that a party "who has failed to perform in full his contract for the sale "and delivery of personal property may recover compen- "sation for the part actually delivered and received there- "under, less the damages occasioned by his failure to make "the complete delivery. Many of the cases establishing "this principle will be found cited in note 19, Sec. 1032, "2 Benj. Sales. In Richards v. Shaw, 67 Ill. 222, in which "the contract was to deliver 500 bushels of corn at a "specified price per bushel, and the seller delivered only

"391 bushels, for which he brought suit, the Court said "that, if the vendee received part of the goods sold under "an entire contract, and retained that part after breach, "this was a severance, and a suit would lie for the price, "but the buyer might deduct damages for the failure to "fulfill the residue of the contract. A contract for the "sale and delivery of a certain number of cattle, unlike "one for the building and completion of a house or other "structure, is severable in its nature, and there is no just "reason why, if the vendee accepts and appropriates to his "own use a portion of the property so contracted for, he "should not pay the stipulated price for such portion, less "the amount of damages sustained by him by reason of the "vendor's failure to make complete delivery."

Saunders vs. Short, 86 Fed., 225.

Applying the foregoing principle to this case the only question is whether the plaintiffs delivered more than 861 casks of clay of the character prescribed in the contract. The fact that the plaintiffs shipped with the clay of the character ordered by the defendant, other clays, would no more make the defendant liable for such other clays than if the casks had contained cement, or some other entirely foreign or distinct substance.

It is really not material whether the Court holds that the contract was entire or not. For the purposes of this argument it may be conceded that the contract was entire as to all clay of the character contemplated by the parties. No exact quantity of such clay was ordered by the defendant in error. The order was for 300 to 400 tons. It was not an order for a carload or several carloads or a ship load. Under the decision of this Court just

cited, if the plaintiffs in error had shipped to the defendand in error 100 tons of clay of the kind ordered instead of the 300 to 400 tons called for in the contract the defendant in error would have had to pay for the 100 tons, but if the plaintiffs in error in shipping the 100 tons had included in casks similar to those used for the clay, 200 tons of iron ore, no one would contend for a moment that the defendant in error would have to accept the clay and the iron ore or else reject both the clay and the iron ore. This illustration in regard to the iron ore is not far fetched because in the instant case about half of the clay shipped came from one mine and the remainder from another and different mine. The clay which came from one mine was substantially up to the sample and suitable for the defendant's uses, while the clay which came from the other mine was not up to the sample and was wholly unfit for the defendant's uses. The clay which came from one mine was as unfit for the defendant's uses as if it had been a quantity of iron ore.

To the effect that in a sale of the character involved in this case the seller could compel the buyer to pay for the portion of the shipment that was equal to the sample and that the buyer could accept the part equal to the sample and reject the remainder, see

Morris vs. Wibaux, 43 N. E., 837.

Holmes vs. Gregg, 28 Atl., 17.

Canton Lumber Co. vs. Liller, 68 Atl., 500.

To the effect that the act of refusing to accept that portion of the clay not in accordance with the sample is one of insistence on, and not a rescission of, the contract, see

Potsdamer vs. Kruse, 58 N. W., 983.

In this connection also, the Supreme Court of the United States has stated:

"When the subject-matter of a sale is not in existence, "or not ascertained at the time of the contract, an under- "taking that it shall, when existing or ascertained, pos- "sess certain qualities, is not a mere warranty, but a con- "dition, the performance of which is precedent to any "obligation upon the vendee under the contract; because "the existence of those qualities being part of the descrip- "tion of the thing sold becomes essential to its identity "and the vendee cannot be obliged to receive and pay for "a thing different from that for which he contracted."

Pope vs. Allis, 115 U. S., 373.

All that has been said herein as to the legal effect of the delivery as made, has been upon the assumption that no waiver of the ordinary legal effect of such delivery had been made; but it appears from the answer, and the proof conformed thereto, that whatever might be the ordinary legal effect of such delivery, an express waiver was made by the plaintiffs in error of their right to rely thereon, and our argument in relation to such waiver will be found in subsequent part of this brief under the sub-head "The Answer."

SPECIFICATIONS OF ERROR 7, 8 AND 12

There was a good deal of evidence as to the custom prevailing in the trade and at the port of Seattle in regard to inspection and delivery and examination of China clay, of all of which the plaintiffs in error complain. The terms in regard to delivery used in the contract were used by parties of long experience in the trade and the meaning which the terms used have in the trade should be controlling, and hence although quite unimportant to a proper decision of this case, was admissible. This testimony is to the effect that the acceptance of delivery of goods enclosed in cases or packages is deemed to apply only to the condition of the packages at the time they are received. As stated by Mr. Howarth (see assignment of error No. 12) "My understanding is that any apparent "defects which can be discovered at the ship's side must "be complained of at that time so that the rights of the "shippers have not been stopped as against the ship, if "there has been any apparent damage caused en route. "As far as examination of enclosed packages such as clay, "where the defects are not latent, (should be patent) and "where it needs considerable time and skill to make the "examinations, then the goods have always been permitted "to go up to the mill."

THE MEASURE OF DAMAGES

The trial court held that the measure of damages which the vendee may claim for breach of an implied warranty of quality is the difference between the actual value of the

property delivered and the higher value of the warranted quality, and if there is no other evidence of value the price agreed to be paid will be regarded as the value of the property of the quality warranted, and that in this case the defendant having offered to return the inferior clay and to hold it subject to disposition by the plaintiffs, the contract price is the measure of damages which it is entitled to recoup. To support this assignment of error (No. 14) the testimony of a witness in regard to a sale of a very small quantity of the rejected clay is cited. It will probably be only necessary to say that the rejected clay had no value to the defendant for the reason that it could not be used by it. In addition to that, however, it appears that the parties to this suit entered into a written stipulation which is in the record, (Trans. 26.) that the defendant without prejudice to the rights of the plaintiffs or the defendant in prosecuting or defending this suit, might sell the rejected clay "it being agreed and understood by this "stipulation that the sale may now be made to minimize "the daily accruing loss in value to the said clay, and "further that the proceeds of said sale shall be held for the "use and benefit of the person or persons entitled thereto "upon the final determination of the within named action." The small sale referred to was made pursuant to this stipulation.

THE ANSWER

Under assignment of error No. 13, the plaintiffs in error contend that the answer is insufficient to support

the defense tendered. In this case Federal jurisdiction is based solely upon the ground of diverse citizenship. The rules of pleading and proof in the State of Washington therefore are applicable. It is well established by the decisions of the Supreme Court of Washington that in trials before a Court where the evidence introduced at the trial is sufficient upon which to base the judgment rendered, if the pleading is defective, such pleading will be deemed to be amended to correspond with the proof; and it is also well established that where a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the complaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure on the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown before the Appellate Court is warranted in reversing and remanding a cause for a new trial. A mere defect in pleading is not such a cause. The pleading must not only be defective but must have operated to the substantial injury of the complainant before that result can follow. Certainly no such injury is shown by this branch of the case of plaintiffs in error.

The answer, however, as a matter of law is sufficient. Defendant denies the contract pleaded in the complaint. Pleads a sale by sample; alleges that part of the shipment was up to sample and part of it was inferior thereto; that the defendant offered to return the inferior clay but the plaintiffs refused to accept it and that the value of the

clay up to the sample was so much, which amount the defendant tendered and kept its tender good.

If this court should decide that the defendant had a right to accept so much of the shipment as conformed to the sample and reject the remainder, then the answer is an absolutely good pleading. If this Court should decide that the defendant by accepting a part of the shipment will be deemed to have accepted all of the shipment, then the answer although the affirmative part thereof is not denominated a counterclaim, is nevertheless good because the ultimate facts upon which the defendant would be entitled to recoup damages are pleaded. In this respect the following language is quite applicable:

"It is next urged that defendant is not entitled to "recoup damages (after having accepted the machinery "purchased) for the breach of the warranty in question, "because the answer, in the language of counsel 'does not "count upon any breach of contract, nor allege that plain- "tiff has been damaged, nor pray for damages nor ask to "have damages sustained by it set off against the pur- "chase price.' * * * * The answer, as already seen, un- "doubtedly seeks to recoup damages sustained by defend- "ant by reason of alleged breach of the warranty made by "plaintiffs concerning the character of the workmanship "and material of the boilers in question. This answer was "not, in terms called a 'set off', or 'counterclaim,' or 're- "coupment,' and perhaps was not technically pleaded as "such; but, whatever it might have been styled, it was in "fact a statement of such facts as entitled the defendant "to diminish the plaintiffs' amount of recovery; and, even "if it be conceded that it was inartificially drawn, it was "never challenged by any motion to make it more specific

"or certain. But it was not, in our opinion, obnoxious to "any such criticism. The answer, especially under code "practice and pleadings, was entirely sufficient to entitle "the defendant to show, by way of reduction of plaintiffs' "recovery, the diminished value of the boilers in question, "occasioned by the defective workmanship or material "complained of."

Florence Oil & Refining Co. vs. Farrar, 109 Fed., 254.

In no event should this Court direct judgment to be entered for the plaintiffs in error. If this Court should hold the answer insufficient to admit the defense actually proven, and should further hold that the pleadings will not be deemed amended to conform to the proof, then we respectfully ask that in reversing the judgment the cause be remanded for a retrial with permission to the defendant to amend its answer.

In connection with the argument of counsel for plaintiffs in error to the effect that judgment should have been entered for the plaintiffs in error as demanded by reason of the character of the answer we desire to call the court's attention to paragraphs 3, 4, 5 and 6 of the answer (Transcript 8-9). It seems that it took some time to transport the clay from Seattle to the mill of the defendant in error at Everett. After some of the clay had been shipped to said mill and it was found that the total shipment contained two kinds of clay, there was still at the ship's side in Seattle, 253 casks. Referring to that state of affairs, the answer sets forth:

"At the time the defendant discovered that the plain-
"tiffs had included in the shipment clay of a grade inferior
"to sample there were still remaining on the dock of
"Galbraith & Bacon & Company at Seattle, Washington,
"two hundred and fifty-three (253) casks. This defend-
"ant promptly notified the plaintiffs that the shipment
"was not in accordance with sample, and after some cor-
"respondence, it was agreed between the parties that the
"defendant should take to its plant at Everett, the remain-
"ing two hundred and fifty-three (253) casks without
"admission of liability for the shipment and without ex-
"pense to it if defendant's claim as to the inferiority of the
"clay should be proved correct."

The statement quoted was certainly a sufficient pleading as to the waiver by the plaintiffs in error of plaintiffs' right to rely upon the taking of the clay from Seattle to Everett as a delivery of the consignment. If the legal effect of the delivery of the clay as made would be to require the defendant in error to accept and pay for it, the plaintiffs in error certainly had the right to waive its rights in that respect and the defendant in error in its answer pleaded that it did make such a waiver and the waiver was undoubtedly as to the whole shipment. In other words the plaintiffs in error shipped to the defendant in error, a commodity the quality of which could only be determined by testing it. After testing a part of the shipment it was discovered that a large part was not a commodity of the kind desired or ordered by the defendant in error. At that time a part of the shipment was still at the ship's side. The defendant in error thereupon promptly notified the plaintiffs in error of the result of its tests and

the whole shipment to its mill at Everett to await an adjustment of the differences which had arisen on account of defendant in error's claim that a large part of the clay was unfit for use. In substance the answer is, and the rejected the whole shipment. To minimize the loss that would fall upon the plaintiffs in error if it eventuated that there was included in the shipment a quantity of a kind of clay not contemplated by the contract of sale, the plaintiffs in error requested the defendant in error to take the whole shipment to its mill at Everett to await an adjustment of the differences which had arisen on account of defendant in error's claim that a large part of the clay was unfit for use. In substance the answer is, and the proof conformed to it, that the defendant in error rejected the entire shipment for the reasons heretofore appearing; that upon said rejectment the plaintiffs in error said to the defendant in error: "You take possession of this entire "shipment and we will either adjust the differences which "have arisen between us, amicably or in a lawsuit, and if "in a lawsuit you shall not be deemed to have waived "any of your rights to reject the unfit clay by reason of "your using that portion of the clay suitable for your "purposes."

Of the 253 casks which were at the ship's side in Seattle, at the time the defendant in error discovered the inferiority of a large part of the clay, 133 casks were of the poorer brand, and under no circumstances could the defendant in error be compelled to pay for these. For

these 133 casks the plaintiffs in error charged the defendant in error about Four hundred sixty-six Dollars ($466.00).

We respectfully submit that there was no error in the action of the trial court and respectfully pray that the decision and judgment be affirmed, with costs.

J. A. COLEMAN,

Attorney for Defendant in Error.

NO. 2025

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

F. G. MANLEY, A. C. RICE, and THE FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, as Successor in Interest of Said F. G. MANLEY and A. C. RICE, and S. A. BONNIFIELD, Receiver,

Appellants,

vs.

D. H. CASCADEN, GEORGE F. DUNBAR, CHARLES SCOTT, and J. BENNETT,

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

[Names and Addresses of Attorneys of Record.]

H. J. MILLER, Fairbanks, Alaska,

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Attorneys for Plaintiff and Respondent.

JOHN L. McGINN, Fairbanks, Alaska,

Attorney for Defendants and Appellants.

In the District Court for the Territory of Alaska, Fourth Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY, and A. C. RICE, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

YOU WILL PLEASE PREPARE transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the papers included within the stipulation entered into by and between the plaintiffs and defendants, namely:

Assignment of errors;
Petition for appeal;
Order allowing appeal;
Bond on appeal;
Citation;
Admission of service thereon;
Order extending return day;
Stipulation, and this
Praecipe.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Court of Appeals for the Ninth Circuit, and on file in the office of the Clerk of the said Circuit Court of Appeals at San Francisco, before the 15th day of September, 1911.

JOHN L. McGINN,
Attorney for Defendants Manley, Rice, First National Bank and Bonnifield.

[Endorsed]: No. 165. District Court, Fourth Division, District of Alaska. Cascaden vs. Dunbar et al. Praecipe for Transcript of Record. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 25, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy. [2*]

*Page number appearing at foot of page of original certified Record.

In the District Court for the Territory of Alaska, Fourth Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY, and A. C. RICE, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,

Defendants.

Stipulation as to Transcript of Record.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the transcript of the record on appeal taken by the defendants F. G. Manley, A. C. Rice and the First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, shall be made up of the following papers:

Assignment of errors;
Petition for appeal;
Order allowing appeal;
Bond on appeal;
Citation;
Admission of service thereon;
Order extending return day:

And that it shall not be necessary for the said defendants F. G. Manley, A. C. Rice, The First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, appellants, to send up a transcript of the entire

record, for the reason that the same has already been docketed with the United States Circuit Court of Appeals for the Ninth Circuit, and that the said record fully discloses all the exceptions taken and noted by said appellants upon the hearing of said cause, and that said transcript of record so printed may be used by said defendants Manley, Rice, First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, the same as though they were the original and only appellants in this action.

IT IS FURTHER STIPULATED that the record shall also include this stipulation as well as the praecipe for the transcript. [3]

Dated this —— day of July, 1911.

H. J. MILLER,
Attorneys for Plaintiff.

JOHN L. McGINN,
Attorneys for Defendants G. F. Dunbar, Charles Scott and J. Bennett.

JOHN L. McGINN,
Attorneys for Defendants F. G. Manley, A. C. Rice, First National Bank of Fairbanks, Alaska, and S. A. Bonnifield.

[Endorsed]: No. 165. District Court, Fourth Division, District of Alaska. Cascaden vs. Dunbar et al. Stipulation. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 25, 1911. C. C. Page, Clerk. By G. F. Gates, Deputy. [4]

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY, and A. C. RICE, and the FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,

Defendants.

Assignment of Errors.

Come now the defendants F. G. Manley and A. C. Rice, the First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, and make the following assignment of errors upon which they rely on this appeal from the decree made by the judge of the above-entitled court in said cause on the 5th day of July, 1910.

I.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph 1 of the conclusions of law requested by the defendants Manley and Rice and the First National Bank of Fairbanks, Alaska, as successor in interest of said Manley and Rice, as follows:

"That the defendants Manley and Rice, by virtue of a deed made and executed upon the 7th day of May, 1904, at Fairbanks, Alaska, by George Fred

Dunbar and Charles Scott to them, as is set forth in paragraph 3 of the Findings of Fact, became the owners of an undivided one-third interest in and to the property mentioned and described in the plaintiff's complaint, and that ever since the said time the said F. G. Manley and A. C. Rice and their successors in interest have been and now are the owners of an undivided one-third interest in and to said properties and of the rents and royalties derived therefrom · that the said Manley and Rice and their successors in interest are now and ever since the gold was extracted from said properties have been entitled to an undivided one-third of all of the gold and gold-dust mined and extracted from said [5] property, and that by reason thereof they are now entitled to one-third of the gold and gold-dust now on deposit with the clerk of this court."

II.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph II of the conclusions of law requested by the defendants Manley and Rice, and the First National Bank of Fairbanks Alaska, as successor in interest of said Manley and Rice, as follows:

"That the First National Bank of Fairbanks, Alaska, as the successors in interest of all the right, title and interest of the said Dunbar in and to the property known as No. 12A below discovery on the first tier, right limit of Cleary Creek, and by virtue of an assignment of all the gold-dust that had been theretofore extracted from said property and which would be thereafter extracted, and which was in the

possession of the various custodians of this court, is entitled now to receive one-sixth (1/6) of the money and gold-dust now on deposit with the clerk of this court in the register of this court pursuant to the orders of this Court heretofore made."

III.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph III of the conclusions of law requested by the defendants Manley and Rice and the First National Bank of Fairbanks, Alaska, as successor in interest of said Manley and Rice, as follows:

"That the First National Bank of Fairbanks, Alaska, is entitled to receive of the moneys of the said F. G. Manley now on deposit with the clerk of this court, the sum of Eight Thousand ($8,000.00) Dollars."

IV.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph IV of the conclusions of law requested by the defendants Manley and Rice and the First National Bank of [6] Fairbanks, Alaska, as successor in interest of said Manley and Rice, as follows:

"That by virtue of the mortgages given by the defendant G. F. Dunbar to E. T. Barnette and S. A. Bonnifield, and which were subsequently assigned to said First National Bank of Fairbanks, Alaska, said First National Bank is entitled to all of the money and gold-dust now in the register of this court in this cause, according to the interest of the said Dunbar in said property."

V.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph V of the conclusions of law requested by the defendants Manley and Rice and the First National Bank of Fairbanks, Alaska, as successor in interest of said Manley and Rice, as follows:

"That said First National Bank of Fairbanks, Alaska, as the assignee of all the right, title and interest of the said G. F. Dunbar in and to the money and gold-dust now on deposit with the clerk of this court, is entitled to his proportion thereof."

VI.

The Court erred in refusing to make a conclusion of law as set forth in paragraph VI of the conclusions of law requested by the defendants Manley and Rice and the First National Bank of Fairbanks, Alaska, as successor in interest of said Manley and Rice, as follows:

"That if the Court finds that the conveyance of the defendant Rice to S. A. Bonnifield, and the mortgages given and assigned to said S. A. Bonnifield by the defendant Dunbar on the 18th day of September, 1906, and the assignment by him of the gold-dust then in the possession of the said S. A. Bonnifield as custodian, were void by reason of the relationship then existing between the said S. A. Bonnifield as custodian and the parties to this action, that then and in that event the said First National Bank, as the [7] successor in interest of the said S. A. Bonnifield, is now entitled to the proceeds derived from the interest of the said Dunbar in said properties and the interest

originally held by the said Rice from the date of his, the said Bonnifield's, discharge as custodian."

VII.

The Court erred in refusing to make a conclusion of law as is set forth in paragraph VII of the conclusions of law requested by the defendants Manley and Rice and the First National Bank of Fairbanks, Alaska, as successor in interest of said Manley and Rice, as follows:

"That the said First National Bank of Fairbanks, Alaska, is entitled to receive of the moneys now on deposit with the clerk of this court one-sixth (1/6) thereof as the successor in interest of the defendant Dunbar, one-sixth (1/6) thereof as the successor in interest of the defendant Rice, and the sum of Eight Thousand ($8,000) Dollars of the moneys belonging to the defendant Manley."

VIII.

The Court erred in making and filing a conclusion of law as is set forth in paragraph I of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the Circuit Court of Appeals has determined that at the time the said Dunbar and Scott executed the deed to said Manley and Rice as set forth in Finding 3, the said Dunbar and Scott owned only an undivided one-half interest in the property therein mentioned; that said deed only operated to convey to said Manley and Rice an undivided one-sixth interest in said property."

IX.

The Court erred in making and filing a conclusion of law as is set forth in paragraph II of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the defendants Manley and Rice were only entitled to one-sixth of the royalties mined and extracted from said property prior to the 15th day of September, 1905, and are now only entitled to [8] one-sixth of the royalties and money now on deposit with the clerk of this court."

X.

The Court erred in making and filing a conclusion of law as is set forth in paragraph III of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the defendant Dunbar at the time of the execution of the note and mortgage and the assignment of the gold-dust to E. T. Barnette was the owner of an undivided one-third interest in and to said bench claim No. 12A below discovery on Cleary Creek, and that the said First National Bank at Fairbanks, is now entitled to one-third of the money and gold-dust now on deposit with the clerk of this court."

XI.

The Court erred in making and filing a conclusion of law as is set forth in paragraph V of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the plaintiff is entitled to a judgment for one-half of the royalties mined and extracted from said properties since September, 1904, up to the time

of the selection and appointment of the said Donnelly as receiver, which said royalty amounts to the sum of Fifty-seven Thousand Eight Hundred Sixty-five and 50/100 ($57,865.50) Dollars; the amount of judgment which plaintiff is entitled to for and account of said royalties, being the sum of Twenty-eight Thousand Nine Hundred and Thirty-two and 75/100 ($28,932.75) Dollars."

XII.

The Court erred in making and filing a conclusion of law as is set forth in paragraph VII of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That of said sum of Twenty-eight Thousand Nine Hundred Thirty-two and 75/100 ($28,832.75) Dollars for which the plaintiff is entitled to a judgment as aforesaid, the plaintiff is entitled to a [9] judgment against the defendant Manley for the sum of Four Thousand Eight Hundred Twenty-two and 13/100 ($4,822.13) Dollars, against the defendants Dunbar and Scott for the sum of Nineteen Thousand Two Hundred Eighty-eight and 50/100 ($19,288.50) Dollars."

XIII.

The Court erred in making and filing a conclusion of law as is set forth in paragraph VIII of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the plaintiff is entitled to an order directing the clerk of this court to apply, out of the moneys and gold-dust now in his possession, sufficient thereof to satisfy the judgments in favor of the plaintiff and

against the defendants Rice and Manley.

XIV.

The Court erred in making and filing a conclusion of law as is set forth in paragraph IX of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the mortgage made and executed by the defendant Dunbar to S. A. Bonnifield, and the assignment of the gold-dust to pay the indebtedness due him amounting to the sum of $10,320, is void and of no effect, for the reason that said Bonnifield at said time in his said capacity of receiver could not accept and receive a mortgage or an assignment of the same.

And that the deed from A. C. Rice to S. A. Bonnifield, and the assignment of the money and gold-dust by the said A. C. Rice to said S. A. Bonnifield, which was then in the possession of said Bonnifield as trustee or receiver, is likewise void."

XV.

The Court erred in making and filing a conclusion of law as is set forth in paragraph X of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That the plaintiff is entitled to interest on his said [10] judgment of $28,932.75 from the 15 day of Aug., 1905, until the same is paid, at the rate of eight (8%) per cent per annum, the same to be paid by defendants in proportion to the respective judgments against them."

XVI.

The Court erred in making and filing a conclusion

of law as is set forth in paragraph XI of the conclusions of law made and filed in the above-entitled cause, and which is as follows, to wit:

"That plaintiff is entitled to receover his costs and disbursements herein against the defendants and each of them."

WHEREFORE said defendants pray that the judgment and decree of said court be vacated and set aside and that judgment be entered in accordance with the Findings of Fact, and that said defendants have such other and further relief as in law they are entitled to receive.

JOHN L. McGINN,

Attorney for Defendants Manley and Rice, The First National Bank, Successor in Interest of Manley and Rice and S. A. Bonnifield.

Service of the foregoing assignment of errors admitted this 29th day of June, 1911.

H. J. MILLER & de JOURNEL,
Attorneys for Plaintiff D. H. Cascaden.

JOHN L. McGINN,

Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett.

[Endorsed]: No. 165. In the District Court for the Territory of Alaska, Fourth Division. D. H. Cascaden, Plaintiff, vs. G. F. Dunbar et al., Defendants. Assignment of Errors. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 29, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. [11]

In the District Court of the Territory of Alaska, Fourth Judicial Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNET, F. G. MANLEY and A. C. RICE and THE FIRST NATIONAL BANK of FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver.

Defendants.

Petition for Appeal.

Come now the above-named defendants F. G. Manley and A. C. Rice, and the First National Bank of Fairbanks, Alaska, successor in interest of said Manley and Rice, and S. A. Bonnifield, who, conceiving themselves aggrieved by the judgment and decree of this Court made and entered in said cause on the 5th day of July, 1910, in the above-entitled proceeding, do hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith, and appellants pray that their appeal be allowed and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Said appellants further pray that an order be

made fixing the amount of security which appellants shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said Appeal by the United States Circuit Court of Appeals for the Ninth Circuit. And your petitioners will ever pray, etc.

JOHN L. McGINN,

Attorney for Defendants Manley and Rice, First National Bank of Fairbanks, and S. A. Bonnifield. [12]

Service of the foregoing petition is hereby accepted this 29th day of June, 1911.

H. J. MILLER & de JOURNEL,
Attorney for Plaintiff D. H.Cascaden.

JOHN L. McGINN,

Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett.

[Endorsed]: No. 165. In the District Court for the Territory of Alaska, Fourth Division. D. H. Cascaden, Plaintiff, vs. G. F. Dunbar et al., Defendant. Petition for Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 29, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. [13]

In the District Court of the Territory of Alaska, Fourth Judicial Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY and A. C. RICE, and THE FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,

Defendants.

Order Allowing Appeal and Fixing Amount of Appeal Bond.

Now, on this 29th day of June, 1911, the same being one of the judicial days of the regular term of this court held at Fairbanks, Alaska, Fourth Division, this cause came on to be heard upon the petition of defendants F. G. Manley, A. C. Rice, and The First National Bank of Fairbanks, Alaska, successor in interest of said Manley & Rice, and S. A. Bonnifield for an appeal, and the Court being advised in the premises—

IT IS ORDERED that the appeal of the said defendants in said cause to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed, and that a certified transcript of the record, proceedings, judgment, decree, orders and testimony and all other proceedings herein be transferred to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal of said defendants be fixed at the sum of One Thousand Dollars, and that the same when given and approved shall act and take effect as a supersedeas bond and also as a bond for costs and damages on appeal.

Done in open Court this 29th day of June, 1911.

PETER D. OVERFIELD,
Judge of said Court.

Entered in Court Journal No. 11, page 248. [14]

Service of the foregoing order admitted this 29th day of June, 1911.

H. J. MILLER & de JOURNEL,
Attorneys for *Pa*intiff D. H. Cascaden.
JOHN L. McGINN,
Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett.

[Endorsed]: No. 165. In the District Court for the Territory of Alaska, Third Division. D. H. Cascaden, Plaintiff, vs. G. F. Dunbar et al., Defendants. Order Allowing Appeal. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 29, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. [15]

In the District Court of the Territory of Alaska, Fourth Judicial Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY, and A. C. RICE, and THE FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, F. G. Manley, A. C. Rice, The First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, as principals, and R. Wood, and ————, as sureties, are held and firmly bound unto the plaintiff D. H. Cascaden, in the sum of One Thousand ($1,000) dollars, to be paid to the said plaintiff. For which payment, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of June, 1911.

WHEREAS the above-named defendants F. G. Manley, A. C. Rice, and the First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, have appealed to the United States Circuit Court of Appeals

for the Ninth Circuit to reverse the orders, judgment and decree of the above-entitled court in said cause,

Now, therefore, the conditions of this obligation are such: That if the above-named F. G. Manley, A. C. Rice, The First National Bank of Fairbanks, Alaska, and S. A. Bonnifield shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea; then this obligation shall [16] be void; otherwise to remain in full force and virtue.

FIRST NATIONAL BANK,
By R. C. WOOD, Pres., [Seal]
R. C. WOOD, [Seal]
Sureties.

United States of America,
Territory of Alaska,—ss.

We, R. C. Wood, and ————, the sureties to the foregoing bond, being duly sworn, each for himself says: I am a resident of Fairbanks in the Territory of Alaska; I am not a counsellor at law or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that I am worth double the amount specified in the foregoing bond as the penalty thereof over and above all my just debts and liabilities and property exempt from execution.

R. C. WOOD.

Subscribed and sworn to before me this 29th day of June, 1911.

[Notarial Seal] ARTHUR FRAME,
A Notary Public for Alaska.

Service of the foregoing bond is hereby accepted this 29th day of June, 1911.

H. J. MILLER & de JOURNEL,
Attorneys for Plaintiff D. H. Cascaden.
JOHN L. McGINN,
Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett.

The foregoing bond is hereby approved.

PETER D. OVERFIELD,
Judge.

[Endorsed]: No. 165. In the District Court for the Territory of Alaska, Fourth Division. D. H. Cascaden, Plaintiff, vs. G. F. Dunbar et al., Defendant. Bond. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 29, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. [17]

In the District Court of the Territory of Alaska Fourth Judicial Division.

No. 165.

D. H. CASCADEN,
Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY and A. C. RICE, and THE FIRST NATIONAL BANK OF FAIRBANKS, ALASKA and S. A. BONNIFIELD, Receiver,
Defendants.

Citation on Appeal.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

The President of the United States of America, To the Above-named Plaintiff D. H. Cascaden, and to the Defendants G. F. Dunbar, Charles Scott, and J. Bennett; and to H. J. Miller and F. de Journel, Attorneys for Plaintiff D. H. Cascaden, and to John L. McGinn, Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett.

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal made and entered in the above-entitled cause in which D. H. Cascaden is plaintiff and George F. Dunbar, Charles Scott, J. Bennett, F. G. Manley, A. C. Rice, and The First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, receiver, are defendants, to shoe cause if any there be, why the judgment and decree made and rendered in said action on the 5th day of July, 1910, as in said order allowing the appeal mentioned, should not be corrected, set aside, and reversed, and why speedy justice should not be done [18] to the said defendants F. G. Manley, A. C. Rice and the First National Bank of Fairbanks, Alaska, and S. A. Bonnifield in that behalf.

Witness the Hon. EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of

America, this 29th day of June, 1911, and the year of the Independence of the United States the ———.

PETER D. OVERFIELD,
District Judge.

Service of the foregoing citation is hereby accepted 29th day of June, 1911.

H. J. MILLER and
F. de JOURNEL,
Attorneys for D. H. Cascaden.
JOHN L. McGINN,
Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett. [19]

[Endorsed]: No. 165. In the District Court for the Territory of Alaska, Third Division. D. H. Cascaden, Plaintiff, vs. G. F. Dunbar et al., Defendants. Citation on Appeal. [20]

In the District Court of the Territory of Alaska Fourth Judicial Division.

No. 165.

D. H. CASCADEN,
Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY and A. C. RICE, and THE FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,
Defendants.

Order Enlarging Time to Docket Cause.

Now, on this 29th day of June, 1911, the same being one of the judicial days of the regular term of this

Court held at Fairbanks in the Territory of Alaska, Fourth Division, the above-entitled cause came on to be heard upon the motion of the attorney for appellants F. G. Manley and A. C. Rice, and the First National Bank of Fairbanks, Alaska, and S. A. Bonnifield for an order extending the time in which to docket said cause and to file the record thereof with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, and for the reason that the same is necessary by reason of the great distance and the slow and uncertain communication between said Town of Fairbanks, Alaska, and the city of San Francisco, California, and the Court upon hearing said motion and being fully advised in the premises, and considering that good cause has been shown for granting the same,

IT IS ORDERED that the time within which said appellant shall docket the said cause on appeal and the return day named in the citation issued by this Court, be enlarged to and including the 25th day of Sept., 1911.

PETER D. OVERFIELD,
Judge of said Court.

Entered in Court Journal No. 11, page 248. [21]

Service of the foregoing order is hereby accepted this 29th day of June, 1911.

H. J. MILLER and
F. de JOURNEL,
Attorneys for Plaintiff, D. H. Cascaden,
JOHN L. McGINN,
Attorney for Defendants G. F. Dunbar, Charles Scott and J. Bennett. [22]

[Endorsed]: No. 165. In the District Court for the Territory of Alaska, Third Division. D. H. Cascaden, Plaintiff, vs. G. F. Dunbar et al., Defendants. Order Enlarging Time. [23]

In the District Court for the Territory of Alaska, Fourth Division.

No. 165.

D. H. CASCADEN,

Plaintiff,

vs.

GEORGE F. DUNBAR, CHARLES SCOTT, J. BENNETT, F. G. MANLEY and A. C. RICE, and THE FIRST NATIONAL BANK OF FAIRBANKS, ALASKA, and S. A. BONNIFIELD, Receiver,

Defendants.

Clerk's Certificate to Transcript.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court for the Territory of Alaska, Fourth Division, do hereby certify that the foregoing and hereto annexed twenty-four (24) typewritten pages, numbered 1 to 24, inclusive, constitute a full, true and correct copy, and the whole thereof, including endorsements, in accordance with the praecipe of the defendants and appellants on file herein and made a part thereof, wherein D. H. Cascaden is plaintiff and respondent; G. F. Dunbar, Charles Scott and J. Bennett, defendants,

and F. G. Manley, A. C. Rice, First National Bank of Fairbanks, Alaska, and S. A. Bonnifield, Receiver, are defendants and appellants, in Cause No. 165, and that the same is by virtue of the order of appeal and citation issued in said cause and is a return thereof in accordance therewith.

And I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to eight dollars and fifteen cents ($8.15), was paid to me by counsel for the defendants and appellant.

In witness whereof I have hereunto set my hand and the seal of said Court, this 27th day of July, 1911.

[Seal] C. C. PAGE,

Clerk District Court, Territory of Alaska, Fourth Division.

By H. C. Green,
Deputy. [24]

[Endorsed]: No. 2025. United States Circuit Court of Appeals for the Ninth Circuit. F. G. Manley, A. C. Rice, and The First National Bank of Fairbanks, Alaska, as Successor in Interest of Said F. G. Manley and A. C. Rice, and S. A. Bonnifield, Receiver, Appellants, vs. D. H. Cascaden, George F. Dunbar, Charles Scott, and J. Bennett, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

Filed August 23, 1911.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 2029

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE PACIFIC LIVE STOCK COMPANY (a Corporation),
Appellant,

vs.

THE SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),
Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Oregon.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 2029

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE PACIFIC LIVE STOCK COMPANY (a Corporation),
Appellant,

vs.

THE SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),
Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Oregon.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

PACIFIC LIVE STOCK COMPANY,

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY et al.,

Appellees.

Names and Addresses of Attorneys of Record.

EDWARD F. TREADWELL, San Francisco, California, and TEAL & MINOR, Spalding Building, Portland, Oregon, for Appellant.

WILLIAMS, WOOD & LINTHICUM, Spalding Building, Portland, Oregon, and LIONEL R. WEBSTER, Beck Building, Portland, Oregon, for Appellees.

Citation on Appeal [Original].

United States of America,
District of Oregon,—ss.

To Silvies River Irrigation Company, a Corporation, and Harney Valley Improvement Company, a Corporation, Greeting:

Whereas, Pacific Live Stock Company, a Corporation has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished

to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 31st day of July, in the year of our Lord, one thousand nine hundred and eleven.

R. S. BEAN,
Judge.

Service of the within Citation on Appeal duly acknowledged this 4th day of August, 1911.

LIONEL R. WEBSTER,
Solicitors for Silvies River Irrigation Company and Harney Valley Improvement Co. [1*]

[Endorsed]: No. ——. United States Circuit Court, District of Oregon. Pacific Live Stock Company vs. Silvies River Irrigation Company and Harney Valley Improvement Company. Citation on Appeal. Filed August 4, 1911. G. H. Marsh, Clerk. By ————, Deputy Clerk.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1907.

BE IT REMEMBERED, That on the 29th day of March, 1908, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit: [2]

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* Page-number appearing at foot of page of original certified Record.

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Compainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the District of Oregon:

The Pacific Live Stock Company, a Corporation organized and existing under the laws of the State of California, and having its principal place of business at the City and County of San Francisco, State of California, and a citizen of the State of California, brings this its bill against Silvies River Irrigation Company, a corporation organized and existing under the laws of the State of Oregon, and having its principal place of business at Burns in the County of Harney, State of Oregon, and within the District of Oregon, and a Citizen of the State of Oregon, and against Harney Valley Improvement Company, a corporation organized and existing under the laws of the State of Oregon and having its principal place of business at Burns in said County of Harney, State

of Oregon, and within the District of Oregon, and a citizen of the State of Oregon, and thereupon your orator complains and says:

1. That your orator is, and ever since the 21st day of [3] January, 1888, has been, a corporation organized and existing under the laws of the State of California and has its principal place of business at the City and County of San Francisco in the State of California, and is a citizen of the State of California; that the purposes for which your orator was incorporated and the business in which it has been and is now engaged, are the buying, selling, raising, grazing and otherwise dealing in and with cattle, sheep, horses and all other kinds of livestock; the purchasing, leasing, hiring and otherwise dealing in and with ranges and pastures for the use of the same; the buying, selling and leasing lands and other real estate; and the doing, performing and undertaking all and every other matter and thing necessary or proper to carry into effect the purposes above mentioned.

2. That the defendant Silvies River Irrigation Company is a corporation organized and existing under the laws of the State of Oregon, and has its principal place of business at Burns in the County of Harney in the State of Oregon and within said District of Oregon, and is a citizen of the State of Oregon.

3. That the defendant Harney Valley Improvement Company is a corporation organized and existing under the laws of the State of Oregon and has its

principal place of business at Burns, in the County of Harney in the State of Oregon and within said District of Oregon, and is a citizen of the State of Oregon.

4. That Silvies River is, and from time immemorial has been, a natural unnavigable stream of running water having its principal sources in Grant and Harney counties in the State of Oregon, and flows in a general southeasterly course through Harney Valley in said Harney County and through certain lands of your orator in said Harney Valley hereinafter described; that at a point in Section 20, Township 23 South, Range 31 East, Willamette [4] Meridian in said Harney Valley, said Silvies River divides into two principal forks or channels known as the East and West Forks of Silvies River; that said Harney Valley slopes gently in a southerly direction and is nearly level, and that on account of the gentle slope of said valley said Silvies River flows slowly through said Valley; that on and above the lands of your orator numerous sloughs, minor channels and swales put out from the main channel of said river and its said forks, and the waters of said river and its said forks, and of said sloughs, minor channels and swales naturally flow upon and through your orator's said lands; that the climate of said Harney Valley is dry and the soil is naturally arid except as it is watered by or from the said river, its forks, minor channels, sloughs and swales, and with water said soil will produce vegetation abundantly; that the character of the lands of your orator is such that they are not generally adapted to the raising of

grain, alfalfa or other artificial crops; that the principal vegetation growing on the lands of your orator consists of natural grasses, and said natural grasses are the most valuable crop which said lands are capable of producing; that said grasses when cut and cured make good hay, and when left standing are of great value for the pasturing of stock; that your orator is, and for more than ten years last past has been, the owner and in the possession of the following described lands situate in said Harney Valley in said County of Harney, State of Oregon, to wit:

All of sections 16 and 36, the SE. ¼ of section 26, and the NE. ¼ of section 34, all in Township 23 S. R. 31 E. W. M.; Lot 1 in section 1, the SE. ¼ of section 2, lot 4 in section 4 and the S. ½ of section 4, the SE. ¼, E. ½ of SW. ¼, SW. ¼ of SW. ¼, and NW. ¼ of NW. ¼ of section 7, the E. ½ and NW. ¼ of section 10, the S. ½ and NE. ¼ of section 11, lots 1, 2, 3, 5, and 6, and W. ½ of NW. ¼, SE. ¼ of NW. ¼, N. ½ of SE. ¼, and S. ½ of NE. ¼ of section 12, **[5]** the SW. ¼ and W. ½ of SE. ¼ of section 13, the S. ½ and NW. ¼ of section 14, the SW.¼ of SE. ¼ of section 15, all of section 16, the W. ½ of section 18 and N. ½ of NE. ¼ of section 18, the N. ½, and N. ½ of SW. ¼ and SE. ¼ of section 21, the E. ½ and the W. ½ of the W. ½ of section 22, the W. ½ of W. ½, SE. ¼, S. ½ of NE. ¼, NE. ¼ of NE. ¼ and SE. ¼ of SW. ¼ of section 23, NW. ¼ of section 24, all of section 25, the SE. ¼, SW. ¼ of NE. ¼, E. ½ of SW.¼, and NW. ¼ of section 26, the N. ½ of section 27, the NW. ¼ of SE. ¼ of section 27, the NE. ¼ of section 35, all of section 36,

all in Township 24, S. R. 31 E. W. M. The NE. ¼ of SW. ¼ and lot 4 in section 7, the S. ½ of SW. ¼ and NW. ¼ of SW. ¼ of section 16, the NW. ¼, S. ½ of NE. ¼, N. ½ of SE. ¼ and SE. ¼ of SE. ¼ of section 17, the NE. ¼ of section 19, the SW. ¼, S. ½ of SE. ¼, and NW. ¼ of SE. ¼ of section 21, lots 2, 3, and 4 and NE. ¼ of SW. ¼ of section 27, the NW. ¼, SW. ¼, W. ½ of SE. ¼ and lots 3 and 4 of section 28, the S. ½ of S. ½ of section 29, the S. ½ of S. ½ of section 30, the E. ½, NW. ¼, E. ½ of SW. ¼, and lots 3 and 4 of section 31, all of sections 32 and 33, the SW. ¼ of section 34, all in Township 24 S. R. 32 E. W. M. The S. ½, S. ½ of N. ½ and lots 1, 2, 3, and 4 of section 1, all of section 2, 3, and 4, the W. ½, SE. ¼, S. ½ of NE. ¼ and lot 1 of section 5, the S. ½, S. ½ of NE. ¼, SE. ¼ of NW. ¼ and lots 1, 2, 3, 4, and 5 of section 6, all of sections 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 23, the N. ½, N. ½ of SW. ¼, SW. ¼ of SW. ¼ and lots 1, 2, 3, and 4 of section 24, the N. ½, S. ½ of S. ½ and NE. ¼ of SE. ¼ of section 8, the N. ½ and N. ½ of S. ½ of section 19, the N. ½ and N. ½ of S. ½ of section 20, the N. ½, N. ½ of S. ½ and SW. ¼ of SW. ¼ of section 21, the N. ½ and N. ½ of S. ½ of section 22, the NE. ¼ of NW. ¼ and lots 1 and 3 of section 26, all in Township 25 S. R. 32 E. W. M. The W. ½ and W. ½ of NE. ¼ of section 12, the S. ½ and NW. ¼ of section 13, the N. ½ of NE. ¼ of section 13, the NE. ¼, N. ½ of NW. ¼ and NE. ¼ of SE. ¼ of section 24, all in Township 25, S. R. 31 E. W. M. All **[6]** of section 36, Township 23 S. R. 30 E. W. M. The W. ½ of NE. ¼, W.

½ of SE. ¼ and S. ½ of SW. ¼ of section 12, the NE. ¼ and E. ½ of SE. ¼ of section 13, all in Township 24 S. R. 30 S. W. M.

5. That during all of the times above mentioned, your orator has in every year raised and mowed and cured a large quantity of said natural grasses growing on said lands for hay, and has used the remainder of said natural grasses for pasture, for the sustenance and support of large numbers of cattle kept by your orator on said lands, and has watered said cattle on said lands, and your orator now uses said lands for the aforesaid purposes.

6. That all of said lands above described are riparian to and irrigable from said East and West Forks of said Silvies River and the various channels and waterways into and through which the waters of said river flow, and the waters of said streams naturally flow through, over and upon said lands thereby irrigating them and enabling your orator to produce said hay and pasturage thereon, besides supplying water for your orator's stock, and for all other purposes for which an owner of land bordering on a running stream has a right to use the waters thereof; that your orator and its grantors built and maintained, and your orator now maintains certain ditches, levees and other works on said lands for the purpose of controlling, regulating and utilizing the waters of said Silvies River so naturally supplied to said lands and said works are now being used by your orator on said lands for the aforesaid uses and purposes.

7. That your orator is entitled to the full, regular

and natural flow of the waters of said Silvies River and of said forks and channels thereof through and over its said lands above described at all times and at all stages of the flow of the waters therein, subject only to the vested rights of other riparian owners in said streams; that very often the flow of said waters is not sufficient in quantity for irrigation of said lands [7] of your orator; that the flow of said waters to and upon said land of your orator is at all times very beneficial to said lands and adds very greatly to the productiveness and fertility thereof, and gives said lands the greatest element of their value; that if the flow of said waters is taken away from said lands said lands will become arid and greatly diminished in value; that the annual rainfall on said lands is small in quantity; that said lands, unless irrigated otherwise than by the natural rainfall, will not produce sufficient vegetation and will not enable your orator to pasture its cattle thereon.

8. That during the spring months of every year there is a large increase in the volume of water flowing down said Silvies River, caused by the melting of the snow in the watershed of said river; that the annual increased flow of water coming down said river at such times has from time immemorial caused said river in the various channels thereof to overflow and to cover with said overflow a large portion of the lands of your orator for a limited period of time each year; that said waters so overflow on account of the slight slope of the lands in said Harney Valley; that the water causing and constituting such overflow has in each year brought large quantities of silt and

material to said lands from the mountains and ravines through which said river and its tributaries flow in their course to said lands of your orator, and deposit said silt and material on your orator's lands and thereby fertilized and enriched said lands and caused said lands annually to yield increased crops of grasses and feed for your orator's stock, and has largely increased the value of said lands; that without such overflowing said lands would have produced little or no feed or crops unless said lands were artificially irrigated; that during the lowest stages of the flow of the waters of said Silvies River and its various channels the waters thereof are confined to and flow within the banks of the same; that when the [8] flow of the waters of said river increases in each year as aforesaid, such increased flow thereof naturally flows over and covers the meadow-lands adjacent to the channels of said river; that said overflow waters, together with the waters confined within the banks of said channels of said river, flow in a definite southeasterly direction through said lands of your orator, and that when the volume of water flowing through said channels of said river diminishes in the summer months of each year, so much of the overflow waters as have not been consumed in irrigation gradually recede to and within the banks of the various channels and waterways of said river.

9. That the main channel of said Silvies River flows through the Northeast quarter of Section 36, Township 22 South, Range 30 East, Willamette Meridian; that said subdivision of land is a number of miles above the lands of your orator above de-

scribed, and also above the point where said main channel of said river divides into said East and West Forks; that in the month of October, 1907, the defendants entered upon said northeast quarter of said Section 36 and upon lands lying easterly thereof, and commenced the construction of a large ditch connecting with the channel of said river and running therefrom to lands lying many miles eastward of said river and not riparian to said river, or any channel thereof, for the purpose of diverting a large volume of the waters flowing in said river and carrying the same through said ditch to and upon said last-mentioned lands, and using said water thereon for the irrigation of said lands; that said ditch is intended to divert and convey, and will be used by said defendants unless restrained from so doing by your Honors, to divert and convey from said river a very large volume of the waters thereof to said last-mentioned lands for the irrigation thereof; that said ditch is designed by said defendants to be six feet deep, forty feet wide on the top and twenty-two feet wide on the bottom, and to have a grade of four feet to the mile; that said lands to which said defendants intend to convey [9] said water by means of said ditch are so situated that no part of said waters after being conveyed to said lands can be returned to said Silvies River, or to any channel thereof, or can flow down to said lands of your orator above described, or any thereof; that by the diversion of said water all of said water will be prevented from flowing down to or upon any of said lands of your orator and said waters will be wholly lost to your orator; that the

capacity of said ditch is intended to be such that the same will be sufficient to divert all of the waters of said Silvies River flowing at the head of said ditch after the spring flow of the waters of said river has subsided.

10. That the diversions of said water so intended to be made by said defendants are wholly without any right on the part of said defendants, or either of them; that neither of said defendants owns any lands riparian to said Silvies River, or any of its channels, or any lands which are entitled to be irrigated with any of the waters of said river, or any of the channels thereof; that said waters so intended to be diverted and withdrawn from said river by said defendants are part of the natural flow of said river and are waters which would, if not so diverted, naturally flow down said river and the channels and waterways thereof to, along, through and over said lands of your orator.

11. That by such diversions of said waters by the defendants your orator will be deprived of the natural flow of said waters of said river to, along, through and over your orator's said lands, and of the annual wetting, irrigation and fertilization of said lands, by said waters, as hereinabove set forth, and your orator will be deprived thereby of the valuable and increased crops, feed and pasture thereon which your orator has annually received and enjoyed on said lands by the natural annual overflow of the waters of said river, and said lands will be greatly deteriorated [10] in quality and greatly depreciated in value thereby.

12. That said defendants will continue and threaten to continue the construction, maintenance and use of said ditch as aforesaid, and will divert said waters of said Silvies River therefrom and carry the same to and use the same upon said non-riparian lands above referred to unless enjoined and restrained by your Honors from so doing; that the high spring flow of said Silvies River usually commences to run in the month of April in each year; that said defendants threaten to and will, unless restrained by your Honors from so doing, divert a large volume of the coming spring flow of said river through said ditch to and upon said non-riparian lands, whereby your orator will suffer great and irreparable injury.

13. That such diversion of the waters of said Silvies River by said defendants at any time during any of the stages of the flow thereof will cause great and irreparable damage and injury to your orator; that all of said water so threatened to be diverted, taken and used by said defendants is actually needed and used by your orator for the irrigation of its lands, for the production of crops, feed and pasture thereon for its stock, and for water for its stock, and for domestic use; that without said water said lands of your orator will not be supplied with water sufficient for the production of crops, feed and pasture thereon, or for the watering of your orator's stock, or for your orator's domestic use; that if said waters are diverted by said defendants the crops on said lands will dry up and be destroyed and your orator will not receive the water

which it is entitled to receive and use as a riparian proprietor owning lands on the channels of said Silvies River for the irrigation of its lands, and for such other purposes as a riparian owner is entitled to use the same; that it will be impossible to estimate the value of the crops, feed and pasture of which your orator will be deprived, or of the amount of the decrease in the **[11]** value of your orator's lands which will result from said diversions so intended and threatened to be made by said defendants.

14. That the matter in dispute herein, to wit, the aforesaid rights of your orator so threatened to be infringed by said defendants, exceeds, exclusive of interest and costs, the value of Two Thousand Dollars ($2000).

AND COMPLAINANT ALLEGES that all of the said acts of said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and can have relief only in a court of equity where matters of this nature are properly cognizable and relievable, to the end therefore, that the complainant may have that relief which it can obtain only in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by the complainant, and that the said defendants and each of them, their agents, servants and attorneys, and all persons acting in aid of them, or either of them, be perpetually enjoined

and restrained from diverting any water from said Silvies River, or any of its forks, channels or waterways thereof, at any place thereon above any of the lands of your orator, or in anywise obstructing the flow of said water to any place above any of the lands of your orator, and that they be compelled to fill up any excavations or openings made by them, or either of them, at or near the banks of said river, or any channel thereof, which will permit any water to flow out of said river, or any of its channels, which would not flow therefrom but for such excavations or openings, and that the complainant may be awarded judgment against said defendants for its costs and disbursements in this suit, and that it may have such further or other relief as the nature of the case may require **[12]** and to your Honors may seem meet.

May it please your Honors to grant unto the complainant a writ of subpoena to be directed to said defendants Silvies River Irrigation Company and Harney Valley Improvement Company, commanding them and each of them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order, directions and decree therein as to this Honorable Court shall seem meet.

And may it further please your Honors, during the pendency of this suit, to issue your writ of injunction enjoining and restraining said defendants, and each of them, their agents, servants and at-

torneys, and all persons acting in aid of them, or either of them, during the pendency of this suit and until the further order of the Court, from diverting any water from said Silvies River, or any of the forks, channels or waterways thereof, at any place thereon above any of the lands of your orator, or in anywise obstructing the flow of said water at any place above any of the lands of your orator, and compelling them to fill up any excavations or openings made by them or either of them, at or near the banks of said river, or any channel thereof, which will permit any water to flow out of said river, or any of its channels, which would not flow therefrom but for such excavations or openings.

And may it further please your Honors to make and issue an order requiring the said defendants to show cause before this Honorable Court at a time and place therein fixed why such writ of injunction *pendente lite*, as above prayed for, should not be issued; and at the same time and as a part of such order, to issue your temporary restraining order enjoining and restraining the said defendants and each of them, their agents, servants and attorneys, and all persons acting in aid of them or either of them until the **[13]** hearing of such order to show cause and until the further order of this Court, from doing any

of the acts threatened to be done by them, as aforesaid.

PACIFIC LIVE STOCK COMPANY,
Complainant.
By J. LEROY NICKEL,
Its Vice-president.
[Seal] And C. Z. MERRITT,
Its Secretary.
WERT MINOR,
ISAAC FROHAM,
Solicitors for Complainant.

State of California,
City and County of San Francisco,—ss.

J. Leroy Nickel, being duly sworn, deposes and says:

That he is the Vice-President of Pacific Live Stock Company, the corporation complainant above named, and that he makes this affidavit for and on its behalf; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and that as to those matters he believes the same to be true.

J. LEROY NICKEL.

Subscribed and sworn to before me this 20th day of March, 1908.

JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

Filed in U. S. Circuit Court. March 29, 1908. J. A. Sladen, Clerk, District of Oregon. [14]

And afterwards, to wit, on the 15th day of June, 1908, there was duly filed in said court an Answer, in words and figures as follows, to wit:

[15]

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY—No. 3276.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Respondents.

Answer of Respondents.

To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon:

Now comes the Silvies River Irrigation Company, a corporation, and Harney Valley Improvement Company, a corporation, the respondents herein, by George H. Williams, C. E. S. Wood, S. B. Linthicum, J. Couch Flanders, practicing as Williams, Wood & Linthicum, and Lionel R. Webster, their solicitors, and not confessing to the many errors and imperfections in the bill herein filed, hereby make answer under oath to so much of said bill as they are advised they ought to answer, and each for itself denies and alleges as follows:

Denies that Harney Valley slopes gently in a southerly direction, but alleges the truth to be that the general slope of that part of Harney Valley in which the waters of Sylvies River and the overflow and the flood waters thereof run is in an easterly and southerly direction, and denies that on and above the lands of the complainant numerous sloughs, minor channels and swales put out from the main channel of said river and its forks, or that the waters of said river and forks and slough or minor channels or swales, naturally flow upon and through complainant's lands. But alleges the truth to be that certain sloughs, minor channels and swales put out from the main channel of said river and its forks above the lands of the complainant **[16]** and on certain of complainant's lands, but not upon all of them, and that the waters of said river and of said forks, sloughs, minor channels and swales naturally flow through certain of complainant's lands, but not through all of them; and avers that about seven miles above the forks of Sylvies River, described in the bill as the east and west forks, another fork in the river puts out from the east bank thereof and flows easterly and southerly in a general direction; but somewhere in the general region of Section 23, Township 23 South, Range 31 East, W. M., there is a district practically entirely level where this branch of the river and in the same general region both the east and west forks of the river dissipate themselves and spread out into marshes and swampy country, and further on toward the south and east gather again into a channel; and the fork of the river above

described, which puts out from the river above diversions into the east and west forks, is known as Foley Slough until it reaches this level country and disappears into swales and swampy ground, and is known as Embree Slough below this point after it again becomes a channel. That this fork of the river known in its two divisions as Embree and Foley Slough flows in a general way parallel to the east fork of the river and re-enters the east fork of the river on the land of the complainant in about Section 24, Tp. 24, R. 32, and this branch of the river is an ancient and permanent channel of the river in which the water has always flowed at some time of the year and it carries in the spring floods of the year nearly as much water as Sylvies River itself.

That Sylvies River is fed by the melting snows and the spring rains and every season, save in exceptional seasons, at very long intervals, there are heavy spring floods and Sylvies River overflows its banks and the banks of its branches, and Foley Slough is filled and overflowing and during the period of heavy spring floods a great portion of the country adjacent to the river and its branches is so overflowed as to become a detriment, and this great excess of water forms the Malheur **[17]** Marshes and Malheur Lake in conjunction with other waters.

That if said flood water collects in too great a quantity for too long a time it forms marshes which grow only flags and tules of no value, and if it stands too deep upon the land it kills out the natural grasses and has a tendency to produce other vegetation in the nature of weeds, of no value.

Respondents have no knowledge or information sufficient to form a belief as to whether complainant for more than ten years last past has been and is now the owner of the lands described in the complaint, or of any part of said land, and therefore leave the complainant to make such proof thereof as it may be advised.

Respondents deny that all of the said lands described in the bill are riparian to or irrigable from the east and west forms of Sylvies River or the various channels or water-ways through which the waters of said river flow, and deny that all of said lands have any right to the waters of the east or west forks, or any channel of Sylvies River, by reason of any riparian ownership of said land in the complainant or its predecessors in interest, and deny that the waters of said streams naturally flow through, or over, or upon, all of said lands.

Deny that the complainant is entitled to the full, regular or natural flow of the waters of Sylvies River, or said forks or channels, over said lands at all times; but aver that in the spring of the year the natural flow in Sylvies River is much more than sufficient for the use of complainant on said land and much greater than any use to which complainant has ever put such full spring flow of the river, and is greater than any use which complainant can put said waters to on said land.

Deny that the flow of said waters to or upon said land is at all times very beneficial or adds to the productiveness thereof, but aver that at times the flow of water is so great as to be a detriment. [18]

Deny that the overflow waters each year have brought large quantities of silt or material to said lands or deposited said silt or materials on said lands, or fertilized or enriched said lands; or caused said lands to yield an increased crop of grasses or feed; but aver that the greater portion of any silt or matter in suspension in said flood waters is deposited close to the bank of the channels in said stream and on the upper portions of said streams before said streams have reached the lands of the complainant; and deny that any great quantity of silt and material is carried in said waters at all; and deny that it is of any value to the land over which said waters overflow.

Deny that all the lands of which respondents are constructing a ditch as described in the bill are not riparian, but aver that certain of said lands are riparian to the said Sylvies River and the channels thereof.

Deny that the diversion of the water intended to be made by respondents, as described in the bill, is without right, but aver that respondents, and each of them, have good and lawful right to divert the surplus and excess flood waters of Sylvies River through the ditch described in the bill by reason of appropriations of such surplus flood water heretofore made by respondents and each of them.

Deny that neither of the defendants own any land riparian to Sylvies River or any of its channels or lands entitled to be irrigated by the waters of said river or channels, but aver that the respondent the Harney Valley Improvement Company is the owner

of lands riparian to the branches and channels of Sylvies River, which lands are entitled to be irrigated by the waters of said river and channel.

Deny that by diversion of the waters described in the bill by the respondents, or either of them, the complainant will be deprived of any natural flow of water of said river to, through, or over complainant's said lands, or of the annual wetting or fertilization of said lands by said water; or deprived of any increased crops or feed or pasture which complainant has annually received or enjoyed on said lands by the natural overflow of said waters of said river; or that said [19] lands will be at all deteriorated or depreciated; but aver that no water to which complainant has any claim of right will be diverted by respondents, or either of them, but that respondents will, if permitted, divert only the surplus and excess flood water, and that complainant will receive all the water which it ever has received to its beneficial use or capable of beneficial use on said lands, and will not in any way be injured by the ditch and diversion of flood water contemplated by respondents.

Deny that respondents will divert any waters of said Sylvies River to which anyone has a vested right, but aver that they will divert only that excess spring flood water which now goes to waste and is a detriment.

Deny that complainant will suffer any injury if respondents be permitted to divert the excess spring flow of said river through said ditch upon said lands, and aver that the present spring flow is past and that respondents have not diverted any water at all, by

reason of the order of this Court restraining respondents from so doing.

Deny that the diversion of the waters of said Sylvies River by respondents at any time, or during any stages of the flow of water, will cause any damage or injury whatever to complainant, and deny that all of the water threatened to be diverted or used by respondents is actually needed or used by complainant for the irrigation of land or for the production of crops, or feed, or pasture, or stock water, or domestic use, and deny that without said water the lands of the complainant will not be supplied with water sufficient for the production of crops, feed, pasture, or watering of stock or domestic use, or that if said waters are diverted the crops on said lands will dry up and be destroyed; or that complainant will not receive the water which it is entitled to receive or use as riparian proprietor, as described in the bill; but aver that the complainant will receive notwithstanding the diversion of the water contemplated by respondents all of the water which complainant has heretofore taken and beneficially used **[20]** on the land belonging to the complainant described in the bill and all the water it is entitled to take and use on said land, and will not in any way be injured or damaged by any contemplated diversion of water by respondents.

Further answering unto said bill, and to each averment thereof, the respondents, each for itself, says, that it hereby disclaims any right or color of right, or intention, to take from Sylvies River, or any branch thereof, any water whatever to which anyone

had any vested right prior to the filing of the appropriation of waters in Sylvies River by the respondent Harney Valley Improvement Company, to wit:

which appropriation states in substance and effect that the respondent Harney Valley Improvement Company only claims to appropriate, or seek to appropriate, so much of the waters of Sylvies River as is not already appropriated by anyone, and the intention of respondents is that if permitted so to do they will carry off the surplus waters of Sylvies River to which no one has right or title and which go to waste and form, together with other water, the Malheur Marshes and Lake, and carry such water upon the arid sagebrush lands for the purpose of reclaiming the same, and respondents have not intended and do not now intend to take any water which anyone has put to a beneficial use at any time when such water is being put to a beneficial use; and respondents disclaim any intention to invade the legal rights of anyone as to any water of Sylvies River or any branches thereof, but only claim and intend to use such water as no one else is putting to a beneficial use, by putting such water to a beneficial use in reclaiming arid lands.

Respondents severally aver that they have made several and distinct appropriations of the surplus waters of Sylvies River not already claimed or appropriated or used by anyone, but they have agreed to and intend to co-operate together in one general irrigation plan for the redemption of certain arid lands to the east of Sylvies River in what is commonly and locally known as the desert, and each of

[21] them since the appropriation of said waters by them severally made has continuously and in good faith been prosecuting said plan for the redemption of said lands by said waters by actual construction of ditches and canals and the expenditure of large sums of money in surveys, and otherwise, and each of them has in all ways been diligent in making said appropriation effective.

And respondents, and each of them, aver that there is a great surplus of flood water and surplus water in Sylvies River, which up to the time of said respective appropriations had not been beneficially used by the complainant or by anyone and is not now beneficially used by anyone, but said excess water goes to waste, as aforesaid, and together with other waters forms the vast marshes and the great lake known as the Malheur Marshes and Malheur Lake.

The plan contemplated by respondents, and each of them, is to place such surplus water on the arid lands and thus effect a two-fold benefit by redeeming the desert lands and reclaiming to a great extent the said marshes, and if upon actual trial it shall prove that respondents, or either of them, deprive complainant, or anyone, of any water heretofore beneficially used by complainant or by anyone, then these respondents, and each of them, disclaims any right to such water so put to a beneficial and prior use by complainant or anyone and agrees so to modify its plan, or if necessary discontinue it altogether, so that the acts of respondents, or either of them, in the

premises, may not or shall not conflict with the established rights of others.

SYLVIES RIVER IRRIGATION CO.
By C. E. S. WOOD,
Att'y.

HARNEY VALLEY IMPROVEMENT COMPANY,
By DRAKE C. O'REILLY,
Secy.,
Respondents.

GEO. H. WILLIAMS,
C. E. S. WOOD,
S. B. LINTHICUM,
J. C. FLANDERS,
LIONEL R. WEBSTER,
Solicitors. **[22]**

United States of America,
District of Oregon,—ss.

I, Drake C. O'Reilly, first being duly sworn, say that I am the secretary of the respondent, The Harney Valley Improvement Company, and have been such secretary since the time of its organization. That I have read over the foregoing answer and am personally familiar with the facts therein stated and that said answer is true.

DRAKE C. O'REILLY.

Subscribed and sworn to before me this 12th day of June, 1908.

[Seal] ALBERT E. GEBHARDT,
Notary Public in and for Oregon.

Due service of the within answer by certified copy,

as prescribed by law, is hereby admitted at Portland, Oregon, 12th June, 1908.

WIRT MINOR,
Of Solicitors for Complainant.

Answer. Filed June 15, 1908. G. H. Marsh, Clerk. **[23]**

And afterwards, to wit, on the 13th day of March, 1911, there was duly filed in said court, an Opinion, in words and figures as follows, to wit: **[24]**

[Opinion.]

In the Circuit Court of the United States for the District of Oregon.

No. 3,276.

PACIFIC LIVE STOCK COMPANY (a Corporation),
Complainant,

vs.

SILVIES RIVER IRRIGATION CO. (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),
Defendants.

EDWARD F. TREADWELL, Attorney for Complainant.

WILLIAMS, WOOD & LINTHICUM, and LIONEL WEBSTER, for Defense.

BEAN, District Judge (Memorandum Decision).

This is a suit brought to restrain the defendant companies from diverting the waters of Silvies River for irrigating purposes. From the point where the

river debouches into the valley down to Malheur Lake, a distance of several miles, the land is comparatively level with but a slight fall towards the lake. Through this territory the river divides into numerous branches and forks. The channels are narrow and shallow and incapable of retaining any considerable portion of the water during the spring freshets, and the adjoining land is thereby naturally irrigated from the waters flowing out through the various sloughs and depressions and spreading over the surface of the country. The land is very productive when so irrigated and practically valueless without water. The defendant company plans to intercept the flow of the water near the head of the valley and divert it from the watershed to irrigate arid lands to the east. The complainant and other parties own large quantities of valuable land naturally irrigated from the river below the point of the defendant's proposed diversion, and the object [25] of this suit is to prevent such diversion. The defendants claim the right to take the surplus water only and disclaim any intention of interfering with the rights of any of the settlers. But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings, and which is annually irrigated by the overflow if undisturbed. Until it is adjudicated in some appropriate proceeding that there is a surplus of water and the quality thereof, I do not think the defendant should be permitted to interfere with the natural flow and

thus invite numerous lawsuits and controversies between it and the settlers.

Decree will therefore be entered as prayed for in the bill, but a provision may be inserted at the foot thereof, reserving the right to the defendants to apply for a vacation of the injunction if it should hereafter be determined that there is any surplus water subject to appropriation by it.

Opinion. Filed March 13, 1911. G. H. Marsh, Clerk. **[26]**

And afterwards, to wit, on Friday, the 7th day of April, 1911, the same being the 160th judicial day of the regular October, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: **[27]**

[Decree.]

In the Circuit Court of the United States for the District of Oregon.

No. 3,276.

April 7, 1911.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION CO. (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

This cause having heretofore come on for final hearing upon the pleadings filed herein on behalf of the respective parties and upon the testimony taken and reported to this Court, and having heretofore been presented by counsel for the respective parties and taken under advisement by the Court, the Court being now fully advised finds:

I.

The complainant, Pacific Live Stock Company, is a corporation organized under the laws of the State of California and a citizen of the State of California; the Silvies River Irrigation Company is a corporation organized under the laws of the State of Oregon and a citizen of the State of Oregon, and the Harney Valley Improvement Company is a corporation organized under the laws of the State of Oregon and a citizen of the State of Oregon.

II.

The Silvies River is, and from time immemorial has been, a natural and unnavigable stream of water having its principal sources in Grant and Harney Counties in the State of Oregon, and flows in a general southeasterly course through Harney Valley; and at a point in Section twenty (20), Township twenty-three (23) **[28]** south, Range 31 east of Willamette Meridian, said river divides into two principal forks or channels known as the East and West Forks of Silvies River. From the point where the river debouches into the valley down to Malheur Lake, a distance of several miles, the land is comparatively level with but a slight fall towards the lake and through this territory the river divides into

numerous branches and forks from which the waters of said river are used by complainant and others for the irrigation of land through which the same flow. Said land when so irrigated is very productive, but practically valueless without water.

III.

In this territory the complainant, Pacific Live Stock Company, owns and is in possession of certain lands of the character above described and irrigated as above described from the waters of Silvies River and its several channels, sloughs and depressions which lands are described as follows:

All of Sections 16 and 36, the SE. ¼ of Section 26 and the NE. ¼ of Section 34, all in Township 23 south, Range 31 east W. M.; Lot 1 in Section 1, the SE. ¼ of Section 2, Lot 4 in Section 4 and the S. ½ of Section 4, the SE. ¼, E. ½ of SW. ¼, SW. ¼ of SW. ¼ and NW. ¼ of NW. ¼ of Section 7, the E. ½ and NW. ¼ of Section 10, the S. ½ and NE. ¼ of Section 11, Lots 1, 2, 3, 5, and 6, and W. ½ of NW. ¼, SE. ¼ of NW. ¼, N. ½ of SE. ¼, and S. ½ of NE. ¼ of Section 12, the SW. ¼ and W. ½ of SE. ¼ of Section 13, the S. ½ and NW. ¼ of Section 14, the SW. ¼ of SE. ¼ of Section 15, all of Section 16, the W. ½ of Section 18 and N. ½ of NE. ¼ of Section 18, the N. ½, and N. ½ of SW. ¼ and SE. ¼ of Section 21, the E. ½ and the W. ½ of the W. ½ of Section 22, the W. ½ of W. ½, SE. ¼, S. ½ of NE. ¼, NE. ¼ of NE. ¼ and SE. ¼ of SW. ¼ of Section 23, NW. ¼ of Section 24, all of Section 25, the SE. ¼, [29] SW. ¼ of NE. ¼, E. ½ of SW. ¼, and NW. ¼ of Section 26,

the N. ½ of Section 27, the NW. ¼ of SE. ¼ of Section 27, the NE. ¼ of Section 35, all of Section 36, all in Township 24 south, Range 31 east W. M.; the NE. ¼ of SW. ¼, and Lot 4 in Section 7, the S. ½ of SW. ¼ and NW. ¼ of SW. ¼ of Section 16, the NW. ¼, S. ½ of NE. ¼, N. ½ of SE. ¼ and SE. ¼ of SE. ¼ of Section 17, the NE. ¼ of Section 19, the SW. ¼, S. ½ of SE. ¼ and NW. ¼ of SE. ¼ of Section 21, Lots 2, 3 and 4, and NE. ¼ of SW. ¼ of Section 27, the NW. ¼, SW. ¼, W. ½ of SE. ¼ and Lots 3 and 4 of Section 28, the S. ½ of S. ½ of Section 29, the S. ½ of S. ½ of Section 30, the E. ½, NW. ¼, E. ½ of SW. ¼, and Lots 3 and 4 of Section 31, all of Sections 32 and 33, the SW. ¼ of Section 34, all in Township 24 south, Range 32 east W. M.; the S. ½, S. ½ of N. ½ and Lots 1, 2, 3, and 4 of Section 1, all of Sections 2, 3, and 4, the W. ½, SE. ¼, S. ½ of NE. ¼ and Lot 1 of Section 5, the S. ½, S. ½ of NE. ¼ SE. ¼ of NW. ¼ and Lots 1, 2, 3, 4 and 5 of Section 6, all of Sections 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 23, the N. ½, N. ½ of SW. ¼, SW. ¼ of SW. ¼ and Lots 1, 2, 3 and 4 of Section 24, the N. ½, S. ½ of S. ½ and NE. ¼ of SE. ½ of Section 8, the N. ½ and N. ½ of S. ½ of Section 19, the N. ½ and N. ½ of S. ½ of Section 20, the N. ½, N. ½ of S. ½ and SW. ¼ of SW. ¼ of Section 21, the N. ½ and N. ½ of S. ½ of Section 22, the NE. ¼ of NW. ¼ and Lots 1 and 3 of Section 26, all in Township 25 South, Range 32 east W. M.; the W. ½ and W. ½ of NE. ¼ of Section 12, the S. ½ and NW. ¼ of Section 13, the N. ½ of NE. ¼ of Section 13, the NE. ¼, N. ½

of NW. ¼ and NE. ¼ of SE. ¼ of Section 24, all in Township 25 south, Range 31 east W. M.; all of Section 36, Township 23 south, Range 30 east W. M.; the W. ½ of NE. ¼, W. ½ of SE. ¼ and S. ½ of SW. ¼ of Section 12, the NE. ¼ and E. ½ of SE. ¼ of Section 13, all in Township 24 south, Range 30 east W. M.

The complainant has for a number of years raised and mowed and cured a large quantity of natural grasses for hay and has used the remainder of said natural grasses for pasture for the sustenance and support of a large number of cattel and has watered [30] its cattle on said lands, and parties other than the complainant also own large quantities of valuable land so situated and irrigated upon the river.

IV.

The defendants about the month of October, 1907, entered upon the northeast quarter of Section 36 in Township 22 south, Range 30 east of the Willamette Meridian and upon the lands lying easterly thereof, and commenced the construction of a large ditch to connect with the channel of Silvies River and running from the channel of said river to lands lying many miles eastward of said river and nonriparian to said river or any channel thereof, for the purpose of diverting a large volume of the waters flowing in said river and carrying the same through said ditch and using the water so conducted for the irrigation of said lands and claim the right to take surplus water from said river, that is to say, water not required for irrigation of the complainant's lands and other lands now being irrigated by means of the

waters of said river as above stated, and disclaim any intention of interfering with the rights of the complainant or any of the settlers or land owners whose lands are irrigated by means of the waters of said river as above described.

V.

All of the water of Silvies River is necessary for the irrigation of the complainant's lands and the lands of others irrigated from the waters of said river as above described, and which are annually irrigated by the waters of said river if undisturbed, and by the diversion contemplated by the defendants of the water of Silvies River the complainant and others owning lands irrigated from said river as above described will be deprived of valuable feed and crops, their lands rendered less valuable, and the complainant will be greatly damaged and injured. **[31]**

VI.

Unless the defendants be enjoined from perfecting their diversion and taking the waters of said river they will continue the construction and maintenance of their ditch and by means thereof will divert waters of said river and will carry the same to and use the same upon nonriparian lands not now naturally irrigated by the waters of said river, and divert a large volume of the waters of said river through said ditch and deprive the complainant and others owning lands naturally irrigated from said stream of the use and enjoyment of the waters of said stream, and such diversion of the waters of said river by the defendants and the deprivation of the complainant of the use and

enjoyment of said rivers will cause great and irreparable damage and injury to the complainant.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that Silvies River Irrigation Company, a corporation organized under the laws of the State of Oregon, and Harney Valley Improvement Company, a corporation organized under the laws of the State of Oregon, and the officers, agents, servants, employees and attorneys of said corporations, and of each of said corporations, and all other persons acting under the authority of said corporations or of either of said corporations, be and they are and each of them be and is hereby strictly enjoined and inhibited from constructing and maintaining said or any ditch to divert waters from Silvies River, and from diverting any of the waters from Silvies River by means of said ditch or otherwise from the lands of the complainant or from interfering with the natural flow of the waters of said river, and he and they are, and each of them is, perpetually enjoined and restrained from diverting any water from any of the forks, channels or waterways of Silvies River at any place thereon above any of the lands of the complainant and from in anywise obstructing the flow of said water of said river and [32] of its forks, channels and waterways at any place above the lands of the complainant above described, and that they be, and each of them is, hereby commanded to fill up any excavations or openings made by them or by either or any of them at or near the banks of Silvies River and any excavations or openings made by them or any or either of them at or

near any channel of Silvies River which will permit any water to flow out of said river or out of any of its channels which would not flow therefrom but for such excavations or openings.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the complainant have and recover of and from the defendants its costs and disbursements in this suit.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that there be reserved to the defendants above named and to each of them the right to apply to this Court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them or by either or any of them.

Done and dated in open court, this 7th day of April, 1911.

R. S. BEAN,
Judge.

Final Decree. Filed April 7, 1911. G. H. Marsh, Clerk. **[33]**

And afterwards, to wit, on the 31st day of July, 1911, there was duly filed in said court, a Petition for Appeal, in words and figures as follows, to wit: [34]

In the Circuit Court of the United States for the District of Oregon.

No. ——.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

Petition for Appeal.

To the Honorable the Circuit Court of the United States for the District of Oregon.

The above-named complainant in the above-entitled cause, Pacific Live Stock Company (a corporation), conceiving itself aggrieved by that part of the final decree heretofore made and entered in the above-entitled cause, which reads as follows, to wit:

"It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and to each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should hereafter

be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them, or by either or any of them."

desires to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that part of said judgment and decree, and respectfully petitions this court for an order allowing the said complainant to prosecute an appeal to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit from that part of said decree; and that the said court also make an order fixing the amount of security which [35] the said appellant shall give and furnish upon said appeal, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

EDWARD F. TREADWELL,
WIRT MINOR,
Solicitors for Complainant.

Petition for Appeal. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. [36]

And afterwards, to wit, on the 31st day of July, 1911, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to wit: [37]

In the Circuit Court of the United States for the District of Oregon.

No. ——

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

Assignment of Errors.

Comes now the complainant in the above-entitled cause and files the following assignment of errors upon which it will rely upon its appeal from that part of the final decree heretofore rendered in said cause, and which reads as follows:

> "It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and to each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them, or by either or any of them."

1. That the Court erred in reserving to the defendants the right to apply to the Court for the vacation of final injunction in said suit.

2. The Court erred in reserving to the said de-

fendants the right to litigate in any proceeding the question as to the existence of any surplus water subject to appropriation by them, or either of them. [38]

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays a reversal of that part of the final decree herein which is above referred to.

EDWARD F. TREADWELL,
WIRT MINOR,
Solicitors for Complainant.

Assignment of Errors. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. [39]

And afterwards, to wit, on Monday, the 21st day of July, 1911, the same being the 95th judicial day of the regular April, 1911, term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [40]

[Order Allowing Appeal, etc.]

In the Circuit Court of the United States for the District of Oregon.

No. 3276.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

At a stated term, to wit, the April term, 1911, of the Circuit Court of the United States of America, of the Ninth Circuit, in and for the District of Oregon, held at the courtroom in the city of Portland on the 31st day of July, 1911—Present, Hon. R. S. Bean, District Judge.

On reading and filing the petition of complainant herein for an order allowing an appeal from that part of the final decree herein, which reads as follows, to wit:

> "It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and to each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding

that there is any surplus water subject to appropriation by them, or by either or any of them."

and the filing herein of the assignment of errors relied upon and an undertaking on appeal, duly approved by the Court, it is ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the portion of the final decree hereinabove referred to be, and the same is hereby allowed, and that a transcript of the record be forthwith transmitted to **[41]** the said United States Circuit Court of Appeals for the Ninth Circuit, said record to consist of the pleadings and final decree in said cause and said petition for appeal, assignment of errors, undertaking on appeal, order allowing appeal, citation on appeal; and the said bond on appeal is hereby approved.

Done in open court this 31 day of July, 1911.

R. S. BEAN,
District Judge.

Order. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. **[42]**

And afterwards, to wit, on the 31st day of July, 1911, there was duly filed in said court, a Bond on Appeal, in words and figures as follows, to wit: **[43]**

[Bond.]

In the Circuit Court of the United States for the District of Oregon.

Portland, Ore. No. 43,116.
Hartman & Thompson, Gen. Agts.

No. ——.

PACIFIC LIVE STOCK COMPANY (a Corporation),

Complainant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a Corporation), and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),

Defendants.

KNOW ALL MEN BY THESE PRESENTS, that we, PACIFIC LIVE STOCK COMPANY (a corporation), as principal, and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland, as sureties, are held and firmly bound unto Silvies River Irrigation Company (a corporation) and Harney Valley Improvement Company (a corporation) in the full and just sum of Five Hundred (500) Dollars, to be paid to the said Silvies River Irrigation Company and Harney Valley Improvement Company, their successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 31″ day of July, 1911.

Whereas the Pacific Live Stock Company is about to petition the Circuit Court of the United States for the Ninth Circuit, District of Oregon, to grant an appeal from a certain part of the final decree entered by the said court in an action therein pending, entitled Pacific Live Stock Company (a corporation), Complainant, vs. Silvies River Irrigation Company (a corporation), and Harney Valley Improvement Company (a Corporation), Defendants; [44]

Now, the condition of the above obligation is such, that if the said Pacific Live Stock Company shall prosecute the said appeal to effect, and if it fails to make its plea good, shall answer all costs which may be awarded against it, then the obligation to be void; otherwise to remain in full force and virtue.

PACIFIC LIVE STOCK COMPANY,
By J. LEROY NICKEL, [Seal]
Vice-President.
By C. Z. MERRITT,
Secretary.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.
By J. L. HARTMAN,
Its Attorney in Fact.
Countersigned by
HARTMAN & THOMPSON, [Seal]
General Agents.

The foregoing bond is hereby approved, this 31st day of July, 1911.

R. S. BEAN,
District Judge.

Bond on Appeal. Filed July 31, 1911. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. [45]

[Certificate of Clerk U. S. Circuit Court to Record.]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing order allowing the appeal of the Pacific Live Stock Company from the final decree of said Court entered in the case of the Pacific Live Stock Company against the Silvies River Irrigation Company and the Harney Valley Improvement Company, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain the original citation in said cause, and a true and complete transcript of the pleadings, opinion, final decree, petition for appeal, assignment of errors, undertaking on appeal, and order allowing appeal in said cause, being all of the record designated by said order allowing appeal to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is twenty-seven 00/100 dollars, and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 26th day of August, A. D. 1911.

[Seal] G. H. MARSH,
Clerk.
By J. W. Marsh,
Deputy. **[46]**

[Endorsed]: No. 2029. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Live Stock Company (a Corporation), Appellant, vs. The Silvies River Irrigation Company (a Corporation), and Harney Valley Improvement Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court of the District of Oregon.

Filed August 30, 1911.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY,
(a corporation),
Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation), and HARNEY VALLEY IMPROVEMENT COMPANY,
(a corporation),
Appellees.

BRIEF FOR APPELLANT.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellant.

Filed this.....*day of October, 1911.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

PERNAU PUBLISHING CO.

No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY,
(a corporation),
Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation), and HARNEY VALLEY IMPROVEMENT COMPANY,
(a corporation),
Appellees.

BRIEF FOR APPELLANT.

This is an appeal from a portion of a decree of the United States Circuit Court for the District of Oregon. The decree in the main is in favor of complainant and appellant, and the appeal is by complainant only from the portion of the decree which is in favor of defendants.

The Facts.

The Complaint.

This suit was brought in the United States Circuit Court of the District of Oregon by the Pacific Live Stock

Company (a corporation), against the Silvies River Irrigation Company (a corporation), and Harney Valley Improvement Company (a corporation). The bill of complaint (Trans. pp. 3-17) alleged that complainant was the owner of a large tract of land situate in Harney Valley, Harney County, Oregon; that the land lies along and is riparian to the Silvies River and its branches and forks; that on said land are numerous sloughs, minor channels and swales, which put out from the main channel of the river and its forks, and the waters of said river and its forks, and of said sloughs, minor channels and swales naturally flow upon and through said land; that the climate of said Harney Valley is dry and the soil is naturally arid, except as it is watered by or from said river; that the land of complainant is best adapted to the growth of grass hay and pasture; that during the last ten years complainant has raised, mowed and cured a large quantity of natural grasses growing on said lands for hay, and has used the remainder of said natural grasses for pasture, for the support of large numbers of cattle; that complainant is entitled to the full, regular and natural flow of the water of said river at all stages of the flow of the waters therein, subject only to the vested rights of other riparian owners on said stream; that very often the flow of said waters is not sufficient in quantity for irrigation of said lands; that the flow of said waters to and upon said lands is at all times very beneficial to said lands and adds very greatly to the productiveness and fertility thereof, and gives said lands the greatest element of their value; that if the flow of said waters is taken away from said lands

said lands will become arid and greatly diminished in value; that the annual rainfall on said lands is small in quantity; that said lands, unless irrigated otherwise than by the natural rainfall, will not produce sufficient vegetation and will not enable complainant to pasture its cattle thereon; that during the spring months of every year there is a large increase in the volume of water flowing down said Silvies River, caused by the melting of the snow in the watershed of said river; that the annual increased flow of water coming down said river at such times has from time immemorial caused said river in the various channels thereof to overflow and to cover with said overflow a large portion of the lands of complainant for a limited period of time each year; that said waters so overflow on account of the slight slope of the lands in said Harney Valley; that the water causing and constituting such overflow has in each year brought large quantities of silt and material to said lands from the mountains and ravines through which said river and its tributaries flow in their course to said lands of complainant, and deposited said silt and material on complainant's lands and thereby fertilized and enriched said lands and caused said lands annually to yield increased crops of grasses and feed for complainant's stock, and has largely increased the value of said lands; that without such overflowing said lands would have produced little or no feed or crops unless said lands were artificially irrigated; that during the lowest stages of the flow of the waters of said Silvies River and its various channels the waters thereof are confined to and flow within the banks of the same; that when the flow of the

waters of said river increases in each year as aforesaid, such increased flow thereof naturally flows over and covers the meadow-lands adjacent to the channels of said river; that said overflow waters, together with the waters confined within the banks of said channels of said river, flow in a definite southeasterly direction through said lands of complainant, and that when the volume of water flowing through said channels of said river diminishes in the summer months of each year, so much of the overflow waters as have not been consumed in irrigation gradually recede to and within the banks of the various channels and waterways of said river.

The complaint further alleges that in the month of October, 1907, the defendants commenced the construction of a ditch taking out of the river, six feet deep, forty feet wide on the top and twenty-two feet wide on the bottom, with a grade of four feet to the mile,* with the intention of diverting a large volume of water above the land of complainant; that none of the water so threatened to be diverted will ever return to the river, and all thereof will be prevented from flowing to said land and will be wholly lost to complainant; that the capacity of said ditch is intended to be such that the same will be sufficient to divert all of the waters of said river after the spring flow has subsided; that by reason of such diversion complainant will be deprived of the valuable and increased crops, feed and pasture on said

*Such a ditch would have a capacity of 800 cubic feet per second.

land and said lands will be greatly deteriorated in quality and greatly depreciated in value; that such diversion at any time during any of the stages of the flow of said river will cause great and irreparable damage and injury to complainant; that all of said water is actually needed and used by complainant for the irrigation of its lands, for water for its stock and for domestic use; that without said water said lands will not be supplied with water sufficient for the production of crops, feed and pasture thereon, or for watering of stock, or domestic use; that if said waters are diverted the crops will dry up and be destroyed and complainant will not receive the water which it is entitled to receive as a riparian owner for the irrigation of its lands and for such other purposes as a riparian owner is entitled to use the same; that it will be impossible to estimate the value of the crops, feed and pasture of which complainant will be deprived, or the amount of the decrease in the value of said land.

The prayer was that defendants be enjoined from diverting any water from the river above the lands of complainant.

The Answer.

The defendants' answer (Trans. pp. 18-28) alleged that in the spring of the year the natural flow in Silvies River is much more than sufficient for the use of complainant on said lands and much greater than any use to which complainant has ever put such full spring flow of the river and is greater than any use which complainant can put said waters to on said land; that at times

the flow of water is so great as to be a detriment; that defendants have good and lawful right to divert the surplus and excess flood waters of Silvies River by reason of appropriations of such surplus flood waters; that no water to which complainant has any claim of right will be diverted by respondents, but that respondents will divert only the surplus and excess flood waters, and that complainant will receive all the water which it now has received to its beneficial use on said lands, and will not in any way be injured by the ditch and diversion of flood water contemplated by respondents; deny that respondents will divert any waters to which any one has a vested right, but aver that they will divert only the excess spring flood water which goes to waste and is a detriment.

The answer further disclaims any right or color of right, or intention to take any water whatever to which any one has any vested right prior to the filing of the appropriation by defendants, that they only claim to appropriate so much of the water as is not already appropriated by any one, and the intention of respondents is to carry off the surplus waters to which no one has right or title, and which go to waste and form, together with other water, the Malheur marshes and lake, and that they have not intended and do not now intend to take any water which any one has put to a beneficial use, and disclaim any intention to invade the legal rights of any one, but only claim and intend to use such water as no one else is putting to a beneficial use; that there is a great surplus of flood water and surplus water in Silvies River which has not been beneficially used by

complainant or by any one, but which goes to waste; that if upon actual trial it shall prove that respondents deprive complainant, or any one, of any water heretofore beneficially used by complainant or by any one, then these respondents disclaim any right to such water so put to a beneficial and prior use by complainant or any one, and agree to modify their plan, or if necessary discontinue it altogether, so that the acts of respondents may not conflict with the established rights of others.

The Opinion.

The evidence not being material on this appeal, it is not contained in the record. The general purport of it, however, is shown by the following opinion of the trial judge (Trans. pp. 28-29):

> "This is a suit brought to restrain the defendant companies from diverting the waters of Silvies River for irrigating purposes. From the point where the river debouches into the valley down to Malheur Lake, a distance of several miles, the land is comparatively level with but a slight fall towards the lake. Through this territory the river divides into numerous branches and forks. The channels are narrow and shallow and incapable of retaining any considerable portion of the water during the spring freshets, and the adjoining land is thereby naturally irrigated from the waters flowing out through the various sloughs and depressions and spreading over the surface of the country. The land is very productive when so irrigated and practically valueless without water. The defendant company plans to intercept the flow of the water near the head of the valley and divert it from the watershed to irrigate arid lands to the east. The complainant and other parties own large quantities of valuable land naturally irrigated from the river be-

low the point of the defendant's proposed diversion, and the object of this suit is to prevent such diversion. The defendants claim the right to take the surplus water only and disclaim any intention of interfering with the rights of any of the settlers. But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings, and which is annually irrigated by the overflow if undisturbed. Until it is adjudicated in some appropriate proceeding that there is a surplus of water and the quantity thereof, I do not think the defendant should be permitted to interfere with the natural flow and thus invite numerous lawsuits and controversies between it and the settlers.

"Decree will therefore be entered as prayed for in the bill, but a provision may be inserted at the foot thereof, reserving the right to the defendants to apply for a vacation of the injunction if it should hereafter be determined that there is any surplus water subject to appropriation by it."

The Decree.

The decree (Trans. pp. 30-37) finds that the waters of the river are used by complainant and others for the irrigation of land through which the same flow; that the land where so irrigated is very productive, but practically valueless without water; that complainant owns the lands described in the complaint which are irrigated by the waters of the river; that complainant for a number of years has raised, mowed and cured a large quantity of hay and has used natural grasses for pasture; that parties other than complainant also own large quantities of valuable land so situated and irrigated upon the river; that defendants intend to divert water to non-

riparian lands; that defendants claim the right to take surplus water from said river, that is to say, water not required for irrigation of the complainant's lands and other land now being irrigated by means of the waters of said river, and disclaim any intention of interfering with the rights of complainant or any of the settlers or landowners whose lands are irrigated by means of the waters of said river; that all of the water of Silvies River is necessary for the irrigation of the complainant's lands and the lands of others irrigated from the waters of said river, and which are annually irrigated by the waters of said river, and by the diversion contemplated by the defendants, the complainant and others owning lands irrigated from said river will be deprived of valuable feed and crops, their lands rendered less valuable, and the complainant will be greatly damaged and injured, and such diversion will cause great and irreparable damage and injury to complainant.

The decree, accordingly, enjoined the defendants from diverting any water from the river above the lands of complainant. At the end of the decree (Trans. p. 37), appears the

Portion of the decree appealed from:

> "It is Further Considered, Ordered, Adjudged and Decreed that there be reserved to the defendants above named and to each of them the right to apply to this Court at any time hereafter for a vacation of the injunction if it should hereafter be determined in some appropriate proceeding that there is any surplus water subject to appropriation by them or by either or any of them."

Assignment of Errors.

(Trans. pp. 40-41.)

1. The court erred in reserving to the defendants the right to apply to the court for the vacation of final injunction in said suit.

2. The court erred in reserving to the said defendants the right to litigate in any proceeding the question as to the existence of any surplus water subject to appropriation by them, or either of them.

Argument.

It will be seen from the foregoing that defendants conceded the right of complainant to have the stream flow to its land so far as the same was beneficial to complainant, and disclaimed any intention to divert any water beneficially used by complainant or any one else, and sought only to divert the surplus water of the river, or water not required for irrigation of the complainant's lands and other land now being irrigated. This, therefore, raised, first, the question of *fact* as to whether there was any such surplus, and, secondly, the question of *law* whether the defendants were entitled to divert such surplus if it existed. The question of fact was litigated and found against the defendants, so that the question of law became unimportant. Nevertheless the court reserves to the defendants the right to "have de- " termined in some appropriate proceeding that there " is any surplus water", and after such determination the right to "apply to this court at any time hereafter

"for a vacation of the injunction". Under these circumstances we contend, *first,* that the question of *fact* as to whether there was any surplus water which could be appropriated by defendants without injury to complainant was put in issue, tried and determined in this case, and, therefore, it was improper for the decree to reserve to the defendants the right to again litigate that question in some other forum or in some other proceeding; *second,* that even if there was shown to be a surplus of water over and above the actual amount required to irrigate the lands of complainant and other users of water, as a matter of *law,* that would not justify its diversion by defendants, and therefore it was improper to reserve to defendants the right to vacate the injunction if such surplus were found to exist. This question of *fact* and this question of *law* we will briefly and separately argue.

First.

THE QUESTION OF FACT AS TO WHETHER THERE WAS ANY SURPLUS WATER WHICH COULD BE APPROPRIATED BY DEFENDANTS WITHOUT INJURY TO COMPLAINANT WAS PUT IN ISSUE, TRIED AND DETERMINED IN THIS CASE, AND, THEREFORE, IT WAS IMPROPER FOR THE DECREE TO RESERVE TO THE DEFENDANTS THE RIGHT TO AGAIN LITIGATE THIS QUESTION IN SOME OTHER FORUM OR IN SOME OTHER PROCEEDING.

From the statement of the pleadings it is clear that the complainant clearly challenged the right of defendants to divert any water from the river. It was there-

fore the clear duty of defendants to set up any right which they claimed to divert the water, under penalty of doing forever foreclosed from doing so. They answered disclaiming any right to divert any water except the surplus water "which has not been beneficially used by " complainant or by any one, but which has gone to " waste". This necessarily raised the issue as to whether or not there was any "surplus water which has not " been beneficially used by complainant or by any one, " but which has gone to waste". The decree shows that this issue was tried, and from a review of the evidence the court found as a fact that "all of the water of " Silvies River is necessary for the irrigation of com- " plainant's lands and the lands of others irrigated from " the waters of said river", and consequently a decree was entered enjoining defendants from diverting any water from the river. It is, therefore, clear that the defendants were bound to and did set up their asserted right to surplus water, that the court was bound to adjudge the existence or non-existence of such surplus water, and did adjudge the non-existence thereof. It therefore adjudged the very fact which it makes the basis of a reserved right of defendants to vacate the decree.

It is a well settled principle of law that there must be an end to litigation. Consequently, a complainant cannot split up his cause of action, nor can a defendant present his defenses in part, reserving the right to litigate other defenses subsequently. If the complainant only brings forth part of his claim, he is barred from

subsequently asserting the balance. If a defendant fails to bring forth a defense, he is estopped from urging it against the effect of the judgment. If either of them presents claims but fail to support them, they are merged in the judgment, the same as if actually tried. Each party is entitled to a judgment on every right or defense asserted, that there may be an end to litigation. The court cannot reserve any question which is squarely presented and necessary for a complete determination of the controversy. No proceeding can be a more "appropriate proceeding" in which to determine the controversy than the proceeding in which the controversy is first presented to the court. The court can imagine the great expense and trouble to which complainant was put in order to meet the issue presented by defendants. Although the evidence is not before this court, the court knows that the Silvies River flows through the Harney Valley in two branches known as the east and west forks. We showed the total irrigation from this stream and the total water available therefor. After an elaborate trial we were able to show beyond a question that all of the water of the river is already appropriated and beneficially used, but were deprived of the benefit of our success by the provision at the foot of the decree to the effect that defendants may have "determined in some " appropriate proceeding that there is any surplus of " water subject to appropriation by them or by either " or any of them". Let us see

The Practical Effect of this Decree.

Complainant was entitled to have this controversy tried and finally determined by the tribunal chosen by it and constituted to determine controversies between citizens of different states. Suppose the State of Oregon should establish (as it in fact has established)* a water commission having judicial power to determine conflicting rights in streams. The defendants, acting under the reservation in this decree, might institute an "appropriate proceeding" before such tribunal against all the water users on the stream to have established " that there is any surplus water subject to appropria- " tion by them or either or any of them". Such a proceeding not being entirely between citizens of different states, would not be removable. On the trial the tribunal might decide every question to the direct contrary of the decision in this case. It might find that there was twice the quantity of water found to be available in this case. It might find that half the amount found in this case to be necessary to irrigate the land irrigated was in fact sufficient. It might find that only half the land found in this case to have been irrigated was in fact irrigated. As a result of this difference in probative facts, it would necessarily reach the conclusion that there was in fact "surplus water subject to appropriation" by defendants. This would not only involve the question of *fact* of the existence of such surplus water, but the question of *law* of the right of defendants to appropriate it as

*Laws of Oregon 1891, p. 52; 1901, p. 136; 1899, p. 72; 1909, p. 319.

against complainant. In the case at bar we had a right to have determined both the question of fact and the question of law. The court found the question of fact in our favor. Therefore the question of law became unimportant. If the fact had been decided against us, we would still have been entitled to have the court decide the question of law, and the court had no right to reserve to defendants the right to have either this question of fact or this question of law determined in any other proceeding. We therefore submit that the court having found that there was no surplus water should have absolutely enjoined defendants from diverting water from the river, and that the reservation in the decree is improper.

SECOND.

EVEN IF THERE WAS SHOWN TO BE SURPLUS WATER OVER AND ABOVE THE ACTUAL AMOUNT REQUIRED TO IRRIGATE THE LANDS OF COMPLAINANT AND OTHER WATER USERS, AS A MATTER OF LAW THAT WOULD NOT JUSTIFY ITS DIVERSION BY DEFENDANTS, AND THEREFORE IT WAS IMPROPER TO RESERVE TO DEFENDANTS THE RIGHT TO VACATE THE INJUNCTION IF SUCH SURPLUS WERE FOUND TO EXIST.

We have already shown that, since the court had already determined as a fact that no surplus existed, it should not have reserved to the defendants the right to have the decree vacated if the contrary fact should be determined. This is as far as we need go to obtain a reversal of the portion of the decree appealed from, and probably as far as the court will deem it necessary

to go. But we also contend that the mere fact that there may be such a surplus would not justify its diversion by defendants or deprive us of the right to have a threatened diversion enjoined. We alleged in our complaint and the court found that the flow of the stream was highly beneficial to our land. We alleged that we were entitled to the full flow of the entire stream. We were entitled to an adjudication upon this allegation. If we were only entitled to the mere amount actually necessary for the irrigation of our lands, that should have been decided. By reserving to the defendants the right to vacate the injunction the court either impliedly decided that defendants could divert such surplus if it existed, or it did not decide the matter at all. In either event, we contend that the decree is erroneous. We can safely state that the following principles have been firmly established by the judicial decisions in the State of Oregon:

1. *Under the law of Oregon, the owner of riparian land is entitled to have the stream flow by, through and over his land, subject only to the right of other riparian owners to make a reasonable use of the water, and is entitled to enjoin any diversion of the water above him.*

Taylor v. Welch, 6 Or. 198;
Coffman v. Robbins, 8 Or. 278;
Hayden v. Long, 8 Or. 344;
Shively v. Hume, 10 Or. 76;
Shaw v. Oswego Iron Co., 10 Or. 371;
Shook v. Colohan, 12 Or. 239; 6 Pac. 503;
Weiss v. Oregon Iron Co., 13 Or. 496; 11 Pac. 255;

Faull v. Cooke, 19 Or. 455; 26 Pac. 662;
Jones v. Conn, 39 Or. 30; 64 Pac. 855;
Cox v. Bernard, 39 Or. 53; 64 Pac. 860;
Morgan v. Shaw, 47 Or. 337; 83 Pac. 534;
Ison v. Nelson Mining Co., 47 Fed. 199;
Brown v. Gold Mining Co., 48 Or. 277; 86 Pac. 361;
Oregon Con. Co. v. Allen Ditch Co., 69 Pac. 456;
William v. Altnow, (Or.) 95 Pac. 202.

2. *The right of the riparian owner is not limited to the right to have flow to his land the mere amount of water necessary to irrigate his land, but he is entitled to all the natural advantages of having the stream flow through his land, including the benefit of overflow and seepage.*

Heilbron v. Fowler Switch Canal Co., 75 Cal. 426;
Heilbron v. Last Chance Water Co., 75 Cal. 117;
Anaheim Union Water Co. v. Fuller, 150 Cal. 327;
Stanford v. Felt, 71 Cal. 249;
Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68;
Cal. Pastoral & Agr. Co. v. Enterprise etc. Co., 127 Fed. 741;
Huffner v. Sawday, 153 Cal. 86;
Miller & Lux v. Madera etc. Co., 155 Cal. 59;
Miller v. Bay Counties Water Co., 157 Cal. 256.

3. *The right of the riparian owner extends to the flow of the stream at all its stages and includes the right to the spring flood as well as the lower stages of the*

stream, to water flowing through sloughs, and even to water flowing out of the defined banks of the river but in a usual and continuous current.

West v. Taylor, 16 Or. 165;
Mace v. Mace, (Or.) 67 Pac. 660;
Miller & Lux v. Madera C. & I. Co., 155 Cal. 59, 78;
Miller v. Bay Counties Water Co., 157 Cal. 256.

4. *The only case in which an injunction has been refused in any state where riparian rights are recognized is where the water is a positive detriment to the riparian owner.*

The limits of this brief are insufficient to justify an exhaustive review of the authorities applicable to the right of a riparian owner to enjoin an interference with the stream above. It is true that there are a few cases in which such relief has been refused, owing either to lack of proof or exceptional conditions, and those who are opposed to the entire doctrine of riparian rights eagerly fall upon those cases to entirely destroy all the substantial benefits of riparian ownership. The task of taking away the ownership of water from the lands to which nature attached it, and to which the law has permanently affixed it as a vested right of property protected by the due process of law clause of the Constitution,* and giving it to the "people" (which generally

**Lux v. Haggin,* 69 Cal. 255.

means a speculating corporation which desires to capitalize something which it obtains for nothing), seems to be a pleasant one to persons of a certain class. It seems to be a popular idea also, but to the honor of the courts it may be said to be one which has received no considerable judicial sanction, as the following brief review of the authorities will show:

Heilbron v. Fowler Switch Canal Co., 75 Cal. 426.

In this case the plaintiff, a riparian owner, sought to enjoin an appropriator from diverting the waters of Kings River. The defendant admitted the threatened diversion and rested its defense on the proposition that it did not intend to take all the water, or a sufficient quantity to injure the lands of plaintiff. The court disposed of this claim in the following language:

> "It does not follow, because the injury is incapable of ascertainment, or of being computed in damages, and therefore only nominal damages can be recovered, that it is trifling or inconsiderable. It is doubtful if it can properly be said that there is any evidence in the case which tends to show, or if that which was offered would have tended to show, that the injury to plaintiffs was inconsiderable; that it was unascertainable, and in that sense inappreciable, may be a good reason why an injunction should issue.
>
> "This question is, however, not an open one in this state, but has been repeatedly passed on and settled in unmistakable terms (*Lux v. Haggin,* 69 Cal. 258; *Moore v. Clear Lake W. Co.,* 68 Cal. 150; *Stanford v. Felt,* 71 Cal. 249; *Parke v. Kilham,* 8 Cal. 77; 68 Am. Dec. 310; *Ferrea v. Knipe,* 28 Cal. 341; 87 Am. Dec. 128).
>
> "No doubt there are cases in which a court will refuse to interfere by injunction to prevent a tres-

pass, where it can see that the injury will be slight, and the injunction may work great injury. Here the defendant professes to take from plaintiffs their property, really upon the plea that it is worth but little to the plaintiffs, and much to the defendant. It is not an ordinary trespass. It is a perpetual taking of the property of the plaintiffs,—a continuous nuisance, which may ripen into a right unless prevented.

"The injury is one, also, which in its nature, cannot be estimated. In the recent case of *Heilbron v. Last Chance Company* it was said: 'The flow of water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and this stimulates vegetation, and the growth and decay of vegetation add not only to the fertility, but to the substance and quantity of the soil'.

"If this be so,—and it cannot be doubted,—it is obvious that in a climate like that where this land is situated, the benefit derived from a flow of water for thirty miles along its boundary, and ten miles through it, cannot be inconsiderable, but yet the extent of benefit must ever be an unknown quantity.

"The defendant here states that the channel of the river above and along this land is deep, and therefore at times of ordinary flow the seepage cannot be great. If so, it must be important to plaintiffs that the channel should carry a full stream, and evidently at such times the percolation would be increased." (Opinion, pp. 430-2.)

Heilbron v. Last Chance etc. Co., 75 Cal. 117.

This was an appeal from a judgment of the same court in an action commenced by the same plaintiff as in the case of *Heilbron v. Fowler Switch Canal Co.,* supra. The question was whether or not a reversioner could maintain an action for the diversion of water from

a stream to which his land was riparian. Deciding the case in the affirmative, the court pointed out the great value of the continued natural irrigation of land and the damage following the interruption of such irrigation.

> "The flow of natural water over land is a continuous source of fertility and benefit; and its withdrawal is followed by consequences which are perpetually injurious to the freehold. This is strikingly illustrated by the averments in the complaint in this case, 'that the waters of said Kings River have hitherto been accustomed to overflow, seep through, and moisten the lands of said rancho, whereby the fertility of said lands was greatly increased, and a large and valuable quantity of natural grass was produced upon said lands'; and that, by reason of the diversion of the water by defendant, 'said lands have failed to produce their accustomed crops of natural grass'. The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation; and the growth and decay of vegetation add, not only to the fertility, but to the very *substance and quantity* of the soil. It is not true, therefore, as claimed by appellants, that the water of a natural stream may be taken away from land for a great number of years, and then turned back, without any permanent injury to the land. Moreover, according to the riparian doctrine (upon which appellants rely in this case), 'the right to the flow of water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, *but as a parcel.*" (Opinion, pp. 121-2.)

Anaheim Union W. Co. v. Fuller, 150 Cal. 327.

In this case riparian owners sought to enjoin upper riparian owners from using the water of the stream on nonriparian land. The defendants claimed, among other

things, that a greater quantity of water remained in the stream after their diversion than plaintiffs needed and that hence no injunction should be granted. The Supreme Court refused to countenance any such rule, holding to the strict rule of riparian rights prevailing in California and Oregon. Following is the language of the court:

> "The defendants urge, inasmuch as the plaintiffs need but four hundred inches of water for their land, and there remained in the stream after defendants' diversion more than two thousand inches, which flows down to and beyond the plaintiffs' land, and which is more than they can possibly use thereon, that it therefore follows that no damage can ever ensue, even if the diversion is unlawful and should ripen into a prescriptive right by continuance, and, hence, that their diversion should not be enjoined. The theory of the law of riparian rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream, each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take, or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above

and below by those having rights in the stream. In view of the well-known aridity of the climate and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right." (Opinion, pp. 335-6.)

Southern Cal. Im. Co. v. Wilshire, 144 Cal. 68.

This was an action where defendants and plaintiffs were both found to be riparian owners, and in reviewing the judgment the court defined in clear and precise language what plaintiff's rights as a riparian owner were:

"But the plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through its lands, including that which the defendants allowed to escape, and which seeped into the stream after being used for irrigation, as well as that which flows in the stream in excess of the increase thus received. As such riparian owner, it has the right to have the stream continue to flow through its lands in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel in its land—and whether it is or is not as valuable in a monetary point of view, *or as beneficial to the community in general, as would be the use of a like quantity of water in some other place,* it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough

if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate (*Moore v. Clear Lake W. W.,* 68 Cal. 146; *Stanford v. Felt,* 71 Cal. 249; *Heilbron v. Fowler S. C. Co.,* 75 Cal. 426; *Conklin v. Pacific I. Co.,* 87 Cal. 296; *Walker v. Emerson,* 89 Cal. 456; *Spargur v. Heard,* 90 Cal. 221)." (Opinion, p. 73.)

Huffner v. Sawday, 153 Cal. 86.

This case held a finding as to the continued cultivation by plaintiff of his riparian lands immaterial, the court saying:

"Finding 15, to the effect that a large part of each of the tracts described in the complaint has for twenty-five years been continously cultivated by means of water taken from the stream is, it is contended, contrary to the evidence. The finding on this point is, so far as concerns the plaintiffs who have riparian rights, not material. Their right to restrain the diversion, by others than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a 'part and parcel' of the land itself (*Duckworth v. Watsonville W. & I. Co.,* 150 Cal. 520 (89 Pac. 340), and plaintiffs are entitled to have restrained any act which would infringe upon this right." (Opinion, p. 91.)

Miller & Lux v. Madera Canal & Irrig. Co., 155 Cal. 59.

This was a case in which the proponents of the visionary scheme of retaining for the "people" rights in the waters of natural streams which they never had, but which nature intended and the common law and our law has held to belong to the adjacent land, hoped to see the Supreme Court of California depart from the rule to which it has so steadfastly held, and modify the doctrine of riparian rights established in that state and in Oregon. Every conceivable argument in favor of the proposition of taking away from the riparian owner a right which nature had given him, without compensation, was advanced. In order to hear and consider further argument along this line, a rehearing was granted, and after the greatest consideration, the court stood firm in its refusal to depart from the rule so long established that a riparian owner is entitled to the enjoyment of the customary flow of the stream, whether it be in torrents following the melting of snows and lasting for a few weeks, flowing out of the banks of the river but in a continuous current, or in quiet streams of even flow throughout the year.

The defendant in this case asserted the right to reservoir what it called the storm, freshet, and flood waters of the Fresno River, which it claimed did not constitute any part of the ordinary or usual flow of the stream. Plaintiff claimed that the rise in the river which brought down this flood or freshet water occurred annually and

constituted the regular annual and usual flow of the river. The affidavits on the part of plaintiff showed:

> "that practically in every year during the winter and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno River carried a large volume of water; that this entire volume of water, if not interfered with, is carried in the channel of the river past the point where the water is diverted from the river into the reservoirs of appellant complained of, and for some distance west of the town of Madera, when the river divides into two or more channels which diverge and flow in the same general direction as the main channel of the river and further on unite with it; that when the volume of water flowing in the river reaches the higher stages a portion of the water flows into these branch channels; that at the highest stages of the flow the water overflows the main and branch channels of the river at various points and spreads over the low-lying lands adjacent thereto; that the main and branch channels of the river and the lands subject to overflow lie in a trough or basin running parallel with the river for a distance of about eighteen miles; that all of the water which so overflows flows on with the water confined in the lower banks of the main and branch channels of the river in a westerly direction and in a continuous body down to Lone Willow slough and finally into the main channel of the San Joaquin River; that none of the water which overflows is vagrant or becomes lost or wasted, but flows in a continuous body, as above stated, within a clearly defined channel, and so continues until the volume of water coming down the stream commences to lower, when the overflow waters recede back into the main channel of the river and flow on with the rest of the water; that this overflow is practically of annual occurrence, and may be and is anticipated in every season of ordinary rainfall within the watershed of

the Fresno River and fails to occur only in seasons of drouth or exceptionally light rainfall." (Language of Department opinion, p. 75.)

The court said:

"Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordiary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno River has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails.

"As to such waters, it is said in Gould on Waters, section 211, 'Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that 'freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no regular intervals.' (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426 (7 Am. St. Rep. 183, 17 Pac. 535); *Cairo Railway Co. v. Brevoort*, 62 Fed. 129; *California P. & A. Co. v. Enterprise C. & I. Co.*, 127 Fed. 741.)

"And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single

natural water course. It is immaterial that the boundaries of such stream vary with the seasons or that they do not consist of visible banks. It is only necessary that there be natural and accustomed limits to the channel. If within these limits or boundaries nature has devised an accustomed channel for the limited flow of the waters therein during the dry season, and an accustomed but extended channel for their flow when the volume is increased by annual flood waters, and all flow in one continuous stream between these boundaries and are naturally confined thereto, and when the waters lower the overflow recedes into the main channel, this constitutes one natural watercourse for all such waters and the rights of a riparian owner thereto cannot be invaded or interfered with to his injury. This is the character of the waters of the Fresno River, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted; they flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin River, and while they spread over the bottom lands, or low places bordering on the main channel of the Fresno River as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.'' (Department Opinion, pp. 76-77.)

The owners of land bordering on such a stream were held to be entitled to all the rights of riparian ownership at all stages of the river.

On rehearing the court, through Mr. Justice Sloss, disposed of the claims made that a different rule than that of the court in department should be applied in the arid west, and that public policy required the storage of water so that the most beneficial use of our natural resources would be achieved.

> "It is suggested that a different rule should apply in a semi-arid climate like that of California, where the fall of rain and snow occurs during only a limited period of the year, and, consequently, streams carry in some months a flow of water greatly exceeding that flowing during the dry season with the result that such increased flow is not, at all points, confined within the banks which marked the limits of the stream at low water. But no authority has been cited, and we see no sufficient ground in principle, for holding that the rights of riparian proprietors should be limited to the body of water which flows in the stream at the period of greatest scarcity. What the riparian proprietor is entitled to as against non-riparian takers is the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off. * * *" (Opinion after rehearing, p. 63.)
>
> "It is argued that unless appropriators are permitted to divert and store for future use water which would otherwise run into the sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the state and that riparian owners should not be permitted to obstruct the development of these resources. It may be that, if non-riparian owners are permitted to intercept the winter flow of streams, in order to

irrigate non-riparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself'. Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not without compensation, be taken from the owners of these lands and transferred to others." (Opinion after rehearing, pp. 64-5.)

Miller v. Bay Cities Water Co., 157 Cal. 256.

Since the decision in *Miller & Lux v. Madera Canal & Irrigation Co.*, the same court has had occasion to pass on the right of an owner of land overlying water bearing strata to enjoin the diversion of water which fed this underground supply. The court said that the case

of such land was analogous to the case of land riparian to a stream. It then held that such an owner could enjoin the diversion of storm or flood waters of annual occurrence which by pressure helped to supply the artesian strata.

> "But even if these storms are of short duration and the waters are precipitated with great rapidity into the bay, they cannot be said for that reason also to be waste waters or subject to appropriation. They are only waste waters and capable of appropriation as such, if they serve no useful purpose as storm waters." (Opinion, p. 281.)

In his latest (3rd) edition of his work on water rights, Mr. Wiel, after a review of the decisions already discussed, summarizes as follows:

> "(a) Generally speaking, non-riparian owners have no rights in streams.
>
> "(b) A riparian owner may enjoin non-riparian use although not using the water himself, and he is not required to show damage to use; the injunction is granted to prevent the impairment of the riparian estate through loss of supply for use in the future.
>
> "(c) The raparian owner is limited to no measure of reasonableness based upon any sharing or correlative use with the nonriparian owner or nonriparian use; he is entitled without limit to the full extent to which the natural flow of water does or may in the future contribute benefit to his riparian land, however much he might be forced to forego some thereof in favor of riparian use by other riparian owners.
>
> "(d) Storm flow is natural flow."

Wiel Water Rights in the Western States, 3rd Edition, Sec. 835.

Under these authorities the mere fact that the stream may carry more water than is absolutely necessary for the riparian lands, does not show that there is "any surplus water subject to appropriation", and complainant was entitled to a *final* decree, forever enjoining defendants from diverting from Silvies River any of the waters thereof.

It is sometimes thought, and has often been urged, that certain decisions of the Supreme Court of California are authority for the proposition that equity will not interpose to enjoin the diversion of the waters of a stream during periods of high water resulting from storms or sudden melting of snows. (*Edgar v. Stevinson,* 70 Cal. 286, *Modoc Land and Live Stock Co. v. Booth,* 102 Cal. 151, *Vernon I. Co. v. Los Angeles,* 106 Cal. 237, *Fifield v. Spring Valley Water Works,* 130 Cal. 552.) It is clear, as pointed out in later decisions of the same court, cited above, that these cases are not authority for any such rule. The test in such cases is: Will the storm waters be useful to the riparian owner? If they are, then it is his right, and one that equity will enforce, to have all the water flow as it is wont to flow, both in periods of flood and periods of scarcity. On the contrary, if the flow is more destructive than useful to the riparian owner, as is suggested in some of the cases mentioned, equity would probably refuse injunctive relief.

In this case the court by its decree finds that all the water which defendants claimed the right to divert was beneficial to complainant's lands. Under this finding complainant was entitled to a decree restraining any diversion by defendants, and the reservation contained in the decree was error and the decree in that particular should be reversed.

Respectfully submitted,

Wirt Minor,
Edward F. Treadwell,
Solicitors for Appellant.

No. 2029

IN

The United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC LIVE STOCK COMPANY
(A Corporation)
APPELLANT

vs.

THE SILVIES RIVER IRRIGATION COMPANY
(A Corporation)
and HARNEY VALLEY IMPROVEMENT COMPANY
(A Corporation)
APPELLEES

Brief on Behalf of the Appellees

APPEAL FROM THE DECISION OF THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON
HON. ROBT. S. BEAN, JUDGE

WILLIAMS, WOOD & LINTHICUM,
and LIONEL WEBSTER,
Attorneys for the Appellees

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND, OREGON

No. 2029

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

THE PACIFIC LIVE STOCK COMPANY
(a Corporation),
Appellant,

v.

THE SILVIES RIVER IRRIGATION COMPANY (a Corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a Corporation),
Appellees.

Brief on Behalf of the Appellants

STATEMENT OF THE CASE

This is an equity cause, appellant seeking relief by injunction against the respondent, Silvies River Irrigation Company, an Oregon corporation, which as successor to the Harney Valley Improvement Co. had commenced the construction of a canal intended to divert the flood waters of Silvies River at a point near where that river enters Harney Valley, Oregon, at the north end thereof. Harney Valley is the bed of an extinct lake or inland sea, about seventy-five miles in length and forty miles in width, covered with sagebrush for the most part, and though appar-

ently level as a floor to the eye, yet sloping with a very slight grade toward the south and east. Silvies River rises at the north, in the Blue Mountains, and has a vast watershed, and flows nearly the entire length of the valley toward the south, and there in conjunction with the Blitzen River (which flows from Stein Mountain at the south to the north), forms Malheur and Harney Lakes; the two lakes being properly one body of water, connected by a neck called the Narrows. It is important to respondent's contentions to understand that these large lakes are formed by these two rivers, the Blitzen flowing from the south northward and the Silvies from the north southward, and that the Silvies River is the longer and larger of the two. It is agreed by both parties that in the spring of the year, with the melting of the mountain snow and the coming of the spring rains, Silvies River is greatly swollen in volume, and a large portion of this flat valley adjacent to the river is inundated. There is a still larger portion, however, which is slightly higher than that immediately adjacent to the river. This is barren sagebrush land and is commonly called, colloquially, and is alluded to in the evidence as "the desert." The dispute in this case is the right of the appellee, The Silvies River Irrigation Co., to appropriate these flood waters, or any part of them. This appellee freely admits that all of the ordinary summer flow of the river is already appropriated, and the entire purpose of its incorporation and activities is to take the surplus flood water which, as it contends, goes to waste and forms, or helps to form, these lakes and a vast area of swamp, and lead it out upon this desert sagebrush land, where sufficient wetting can be got from the flood waters to make a

good crop of grass or alfalfa, or of cereals. The appellant, on the other hand, claims that the entire flood water is the very thing which it depends upon to make its hay crop on its grass meadows, and that it needs the whole of the flood and during the whole period of the flood. The appellee, in turn, retorts that appellant does not need the entire flood, but that the full volume of the river within its banks would be quite sufficient for its purposes of irrigation, especially were the water properly used, and that the flood water which goes out of the banks and spreads over the country ought to be allowed to the appellee for its reclamation of the desert lands; and the appellee alleges that the appellant does not use the water scientifically, but that it comes down and overflows the natural grass meadows, wastefully and practically just as it used to from time immemorial, putting an unnecessary depth of water on the meadows, as much as one foot to three feet in depth, which is beyond all needs of irrigation; and having thus naturally flooded these low lands, the great excess makes the swamps which border Malheur Lake, and the evidence shows that about one-third of appellant's lands described in the bill is swamp. The court below apparently did not come to the conclusion that appellant had sustained its contention that all the flood water was needed for its own particular private holdings, but the court seems to have reached the conclusion, not strictly warranted by the issues, that all of the private holdings along the river, including the complainant's, with others not parties, needed the flood waters, so far as the evidence tended to disclose the facts, but that this evidence was not sufficiently full and satisfactory. At

page 29 of the transcript of record, the court says in its opinion:

"The defendants claim the right to take the surplus water only, and disclaim any intention of interfering with any of the rights of the settlers. But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings and which is annually irrigated by the overflow, if undisturbed. Until it is adjudicated in some appropriate proceeding that there is a surplus of water and the quality (sic) thereof. I do not think the defendant should be permitted to interfere with the natural flow, and thus invite numerous conflicts and controversies between it and the settlers."

The court added from the bench orally, by way of explanation, that Oregon had adopted a water code and had appointed a Water Board authorized to take up all contests and bring before it all claimants from the head to the mouth of the stream, and upon proper evidence duly recorded to adjust the various claims, subject to final appeal to the courts; and he did not think in this suit between two private parties upon the evidence before the court, this important matter should be prejudged and the efforts of the Water Board toward a general adjustment be impeded.

Carrying out this idea the court, in its opinion, page 30 of the transcript, ordered that the decree be entered with a provision at the foot thereof, reserving the right to these appellees to apply for a vacation of the injunction if it should hereafter be determined in an appropriate proceeding that there is any surplus water subject to appropriation by it. The decree, following this intimation, pro-

vides, page 37 of the transcript: "It is further considered, ordered, adjudged and decreed that there be reserved to the defendants above named, and each of them, the right to apply to this court at any time hereafter for a vacation of the injunction if it should be hereafter determined in some appropriate proceeding that there is any surplus water subject to appropriation by them, or by any or either of them." It is from this portion of the decree that appellants have brought their appeal to this court.

The appellees have moved to dismiss the appeal and at the foot of this brief renew said motion on the ground that the portion of the decree appealed from is discretionary with the court below, and therefore neither creates nor denies any appealable right. The appellees in the alternative also move against a diminution of the record and show that the entire testimony in the case (save as will be hereafter noted) and all the exhibits remain in the court below and no transcript thereof has been brought to this court, and appellees will argue that either the appeal be dismissed or that the full record be ordered into this court so that this court may proceed as in a trial *de novo*, otherwise gross injustice will be done these appellees.

The appellees also show to this court that there is a stipulation on file in this cause (No. 2029) permitting either party to use in this cause the testimony taken in the cause by this appellant against William Hanley *et al.*, also before this court (No. 2036), and the appellees contend that this stipulation follows the cause in all its proceedings and if this court should take jurisdiction of the appeal and deny the motion to complete the record, still there is a record before it upon the facts in this case (the trans-

cript in cause No. 2036), which though but a partial record and a very inconsiderable part of the testimony pertinent to this case, yet of itself shows that the decree of the court below should be modified to the extent of dissolving the injunction and permitting the appellee, the Silvies River Irrigation Company, to proceed with its important and beneficial public enterprise.

The appellees desire this court to clearly understand, however, that they do not consent to any such hearing upon so incomplete a record, and have only discussed the record before the court out of abundance of caution.

The appellees feel that the real record, made with especial view to the issues in this case (over 600 pages typewritten testimony and all the maps, plats, etc.), are not before the court and it would be very unjust to try the cause upon so mutilated a record. But if appellees can give this court jurisdiction by consent, and if this court is willing to make a precedent by hearing an appeal on a discretionary matter, then appellees will be glad to have the cause heard *de novo,* but only upon a full and complete record.

With this statement appellees submit the following

POINTS AND AUTHORITIES

I.

The part of the decree appealed from lay within the discretion of the court, and is not appealable.

McMicken v. Perin, 18 How. (59 U. S.) 507 (citation page 511).

Wyle v. Coxe, 14 How. 1.

Steines v. Franklin County, 14 Wall. 15 (citation page 22).
Terry v. Commercial Bank, 92 U. S. 454.
Marine Insurance Co. v. Hodgson, 6 Cranch 206 (citation page 217).
McLeod v. City of New Albany, 66 Fed. Rep. 378.
Barr v. Gratz, 4 Wheat. 213 (citation page 220).
And see Brockett v. Brockett, 2 How. 238 (citation page 24).
And see 2 Daniell's Chancery Practice, 4th Ed. 1462-1463.
Street's Fed. Equity Practice, 2083.
Am. Enc. Pleading and Practice, 2, page 92.

II.

It lies within the discretion of the chancellor to give to either party leave to move against the decree in the future and to reserve to himself the right to open the decree for further consideration by an entry at the foot of the decree saving this right.

Le Grand v. Whitehead, 1 Russell 309.
Daniell's Chancery, 996.
Foster's Federal Practice, page 671.

III.

The appellants, by appealing from only this portion of the decree, consent to the balance of the decree.

2nd Daniell's Chancery (4th Edition), page 1467.
Parker v. Morrell, 2 Phillips 453.
Rawlins v. Powell, 1 Peere Williams 300.
Consequa v. Fanning, 3 Johnson's Chancery 587 (595).

IV.

The appellees have a right to have the entire decree considered, although only a part of it was complained of by appellants. Every appeal is a trial *de novo*.

2 Daniell's Chancery, page 1489.
Rawlins v. Powell, 1 Peere Williams 300.
Walter v. Symes, 1 DeG., M. & G. 240.
Sherwin v. Shakespear, 5 DeG., M. & G. 523.
Teaff v. Hewitt, 1 O. St. 511.
Consequa v. Fanning, 3 Johnson's Chancery 587.
Terhune v. Colton, 12 N. J. Equity 312 (see 318).

V.

As a question of fact, appellees contend that there is surplus flood water, and that the record should be completed in this court by ordering up the testimony and exhibits, and the decree of the court below should be reversed so as to permit appellee to go on with its work and make demonstration that there is surplus flood water.

ARGUMENT

We first desire to make a verbal analysis of the opinion, page 29 of the transcript. The court there says: "But it is not shown that there is any surplus water. Indeed, the evidence in this case tends strongly to support the complainant's position that all the water is necessary for the irrigation of the land in private holdings and which is annually irrigated by the overflow if undisturbed." We think the meaning of the court is that the evidence strongly *tends* to support, not that it "tends strongly to support," because the rest of the opinion and the decree as entered show that the court believes under appropriate proceed-

ings there may be shown some day that there is surplus water. The evidence before him, therefore, must have left him in doubt as to what would be the result of a more complete examination. The court says that the evidence tends to show that all the water is necessary for the irrigation of land "*in private holdings.*" He does not say "the lands of the complainant," and yet strictly that was the only right which he could consider. This was a suit between private parties, and between no other parties whatever other than the two corporations, complainant and respondent (for it is shown that the Silvies River Irrigation Company is successor to the Harney Valley Improvement Company). The evidence, however, took a wider range, and some settlers were introduced by the complainant, not to support complainant's right to the water, but to show their own right to and need of the flood waters. This testimony was taken over objection. It is perfectly apparent that it called to the attention of the court the fact that there were many claimants along this river, and that the court conceived it ought not to permit the respondent to go on with its canal and take out the surplus water, because of the great tangle of lawsuits and controversies which might grow out of such act. But, as the court could not decide the rights of parties not before him, and as whatever he might decide seemed certain to result in serious complications in the further adjustment of water rights in Harney Valley, the court adopted the plan of granting present relief to complainant by enjoining respondents, quite as much in the interest of the numerous settlers not before the court as in that of the single complainant; but the court, as chancellor, reserved to him-

self the right, and gave to respondents the right to open up the decree, if upon a larger and more complete examination of the whole river by a competent body, with all claimants and parties before it, it should then be judicially determined that there was actually a surplus of water in the flood season. This reservation of further right to consider is so common generally and so clearly equitable in this case, and so clearly within the discretion of the court, that we are inclined to treat the legal side of it as elementary, and to pass it without discussion.

Suppose the Water Board of Oregon, upon accurate measurement, and by requiring people to be economical and scientific in the use of the water, finds that in the spring season everybody can be given his full irrigation right, and still there remains a surplus of flood water. Would it not be a shame that the Water Board of Oregon should find its hands tied, and this respondent should find its hand tied, from carrying out a great public work of reclaiming the desert and making homes for the people merely to give, upon evidence not fully satisfactory to the court, the absolute control of Silvies River to this cattle company? It will be perfectly evident to this court, from a study of the opinion of the court below, that that court is animated in rendering its decree far more by a view of the general situation and the numerous settlers in Harney Valley than by any convincing idea as to the rights of the complainant. Cases may be found where the right to reopen the decree reserved at the foot thereof has been interpreted as not a right open to everybody, as, for example, a subsequent intervenor; also the original purpose of reserving the right of further proceedings has been

determined, and the actual opening up of the decree has been limited by that purpose. But in this case the court has made it perfectly clear that the right is reserved to the respondents; and that the condition is that if larger proceedings of a more public and general nature shall in the future show that there is surplus water, then the court reserves to itself the right to do equity, and will not by a final and unqualified decree be led into doing inequity. The reservation of power is really quite as much for the court in this case as for the respondent; and we think the decree would be so interpreted in the future should occasion arise.

It is just as true of the federal courts of equity today as it ever was of the English courts of chancery, that the powers of the court are large, flexible and sufficient for the court to meet the particular circumstances of the case and do equity. It is upon this great general principle of equity jurisprudence that the right to consider further rests. Daniell says, page 996 (fourth edition): "Although the general rule of the court is to make a complete decree upon all the points connected with the case, it frequently happens that the parties are so circumstanced that a decision upon all the points connected, with their interests, cannot be pronounced until a future period. * * * * *" The court then instances a case when the interests in a fund may alter at a future time and continues, "the same sort of liberty is also given in any other case in which it may seem requisite and the effect of it is not to alter the final nature of the decree. A decree with such a liberty reserved is still a final decree, and when signed and enrolled may be pleaded in bar."

Street on Equity Pleading and Practice quotes this language with approval, Section 1966.

> A case in equity cannot be appealed piecemeal.
>
> (2nd Daniell's Chancery Pleading and Practice, 4th Edition, page 1467.)

The appellant may appeal from a portion of the decree which is distinctly separable and stands alone from the rest of the decree, but if he elects to do so he is bound by it, and can have no other appeal. His right of appeal is exhausted. (Id.)

Also, by appealing from a part of a decree only the appellant admits the remainder to be correct, and is estopped to question it. (Id.)

Upon any rehearing or appeal in equity the whole case is open as upon a trial *de novo*.

(Daniell's Chancery, 4th Edition, page 1488.)

So that if the appeal be against the whole decree, it is competent for the court to make a decree more favorable to the respondent. (Id.)

Where the appeal is against a part of a decree only, the respondent may go into the whole case, whilst the appellant can only go into the parts complained of in his petition. (Id., page 1489.)

These elementary principles are all adopted by Street, practically verbatim, and we shall assume that they are unquestioned and unquestionable. The principles are very clear. We begin with the settled conclusion that an appeal in equity is a trial *de novo*. This being so, the Appellate Court has the entire case before it for consideration, and cannot be deprived of this jurisdictional right. Being a

court of chancery, equally with the court below, it is its business to administer equity as it sees it, precisely as if the case had never been tried before, and this being true, it necessarily follows that the respondent has the right to ask the court for the same relief and the same decree which he sought in the court below. The reason that the appellant is more limited in his right is because by appealing from only a portion of the decree he has by his own voluntary act confessed himself satisfied with the rest, and is estopped to contest it in the new trial in the Appellate Court just as if he had admitted upon record in the court below the same conclusions. Naturally, there are not very many cases illustrating these elementary questions of practice which have really never been questioned, but the following shed some light on the subject:

Parker v. Morrell, 2nd Phillips 453, citation page 461.

Teaff v. Hewitt, 1 O. St. 511, cit. page 519.

Terhune v. Colton, 1 Beasley, (N. J.) 312, cit. page 318.

Sherwin v. Shakespear, 5 DeGex M. & G. 517, citation page 523).

Consequa v. Fanning, 3 Johnson's Chancery 587, citation page 595.

Rawlins v. Powell, 1 Peere Williams 300.

Watts v. Symes, 1 DeGex M. & G. 240.

If this case is before the court at all, it is before it as a trial *de novo,* and nothing can rob the respondent of his right to go into the whole case for a reversal or modification of the decree on points other than those appealed from by the appellant. In this particular case the wisdom of the rule and the absolute inequity of a contrary rule are

made apparent by a slight consideration of the circumstances. The appellees, though not satisfied with the decree of the court below, and though believing that the general interests of the public have been sacrificed in stopping the work of the appellees, yet felt so sure of final triumph whenever the waters of Silvies River in the spring floods should be accurately determined and the use of the waters of Silvies River adjusted between all claimants that they refrained from taking any appeal themselves, expecting to join with the Water Board in a movement in contemplation to adjust all these water rights in Harney Valley. If it should transpire upon such a thorough examination that there is no surplus flood water, then the work already performed by the appellees must go for naught, and the decree entered in the court below must stand. But if it should be judicially determined as respondents confidently believe it will, and as appellants evidently fear it will, that there is enough water going to waste every year to reclaim at the least two hundred thousands acres of land, then these respondents would expect to make that showing upon a petition to reopen the decree, and relying upon that have not appealed. Every principle of equity and of public policy requires that appellees be premitted to do this, and that this decree be not suffered to arise in the future as a bar to the progress of this important portion of this state. But if we assume that this court finds it possible to assume appellate jurisdiction of this use by the chancellor of his discretionary power (well within his judicial discretion), and if we go further and assume it possible that this court then vacates this entry at the foot of the decree, and if we go still further and assume that this court refuses to order

up the testimony and exhibits in the case, then the appellees have really become entrapped by the act of the court below and of this court, for they have suffered a decree to become permanent against them without appeal and without any consideration of the testimony taken, which they certainly would have appealed from upon a complete record of the evidence but for the saving clause at the foot of the decree. And how can anyone be hurt by the leave granted at the foot of the decree? If at any time it should be demonstrated that there is surplus flood water, then certainly equity requires that that surplus water be put where it will do the most good. If there be *surplus* water, then nothing belonging to appellant is taken away from it and it is in no way injured. If there be no surplus water the decree will stand forever, and likewise it will be in no way injured. There is no aspect under which the right to further consider can be held to be an injury to the appellant.

UPON THE EVIDENCE AVAILABLE IN CASE No. 2036 ONLY, AND UNDER PROTEST AGAINST CONSIDERING THE CASE AT BAR UPON SO INCOMPLETE A RECORD, WE PROCEED TO DISCUSS THE EVIDENCE IN PACIFIC LIVE STOCK CO. v. WM. HANLEY *et al.* (No. 2036), STIPULATED AS APPLICABLE TO THIS CASE ALSO.

THE EVIDENCE SHOWS THAT THERE IS SURPLUS FLOOD WATER, AND THE COURT BELOW ERRED IN MAKING THE INJUNCTION PERMANENT.

If we have the power to set aside the judicial discretion of the court below and give this court jurisdiction to hear the whole case, and if this court is willing, with our consent, to hold that this is an appealable portion of a decree, we are, as stated, perfectly willing that this court should take jurisdiction of the case for a trial *de novo,* provided the court will upon our motion for a completion of the record order before it the testimony taken and exhibits filed in this cause at bar. An examination of the testimony in the Hanley case (2036), in which testimony on the part of appellees was purposely made very incidental to the issues in the case at bar, cannot fail to convince the court that in the testimony taken in the case at bar upon the direct issue of surplus water *vel non,* there will be found much to show that in the spring there is a great quantity of surplus flood water in the Silvies River and to suggest what may be found in the 601 pages of testimony not before the court, we examine here the testimony in the Hanley case which is before the court—but only suggestively, not completely, for we cannot bring ourselves to believe that this court will take jurisdiction of this appeal; still less can we believe that if taking jurisdiction he will refuse to have the whole record before it. It is upon these beliefs that the following is offered.

The case around which the thickest smoke of battle lingered was the Hanley case, No. 2036, which does not relate to surplus waters at all, but is merely a supplemental proceeding interpreting an old decree fixing Hanley's right to the use of the waters of Silvies River for his own particular ranch. In this case it was claimed that he had dug new ditches, altered old ones, altered dams, built

dykes and other obstructions not consistent with the original decree, etc. Most of these allegations were tried out on contempt proceedings and Hanley was discharged. Afterward the supplementary bill now in question (case No. 2036) was filed against Hanley on the ground of interpreting the original decree, but in reality trying out in a new form the old contempt proceedings. The issues in this case were so much more vivid and the feeling on both sides so much more evident that on our part the examination of the witnesses in that case was put to the front, and kept to the front, upon the issues involved in that case alone. Nevertheless, if it be sought for, we think evidence lies in the record in case No. 2036 overwhelmingly showing that there is a great surplus of water from the middle of February to the middle of May, as extreme limits, with the heaviest flood usually during the month of April. The appellant's own witness, Charles Cronin, shows that high water comes ordinarily during April and the flood stage lasts for a month or six weeks (pages 117-118); and the same witness shows that the grass raised is a wild water-grass on wild water meadows, and that the lands are inundated naturally, just about as they have always been, to raise this wild grass (page 119). Also, that the lands in question are largely tule swamp (pages 127 *et seq.*). Another of appellant's witnesses, Bart Cronin, shows that the season of heavy flood is March and April; that it lasts a month or six weeks (pages 167-168). John Gilcrest, the general superintendent for the appellant, testifies that the time of flood varies with the melting of the snows, and comes sometimes in February, but rarely, and the general break-up comes usually in April (page 247).

On page 292 it is shown by an interrogation by Mr. Treadwell that the title to certain of appellant's lands comes through the State of Oregon under the Swamp Land Act, as swamp land, and Mr. Gilcrest admits that certain large fields are half of them covered with tule, or a fourth of them are tule, and in making a guess as to the whole amount says ten sections of the company's lands are covered with flag and tule. That would be six thousand four hundred acres of tule swamp, and if that doesn't indicate surplus water somewhere it will be difficult to produce any testimony that does. In one field, called the "Red S" field, Mr. Gilcrest admits in the neighborhood of four sections of tule and flag (pages 293-294-395). A fair inference from Mr. Gilcrest's testimony, on page 437, is that in the spring of the year in which he was testifying there was more water than they could properly handle for a short time; and on pages 320 and 321 he shows that this crop that they harvest for hay is a water-grass, indicating low ground and overflooded lands. J. H. Hill, also a witness for the appellant, testified that there is no stated season, but they watch the snow going off the mountain. Ordinarily the floods begin early in April and last till the middle of May (page 349), and that there is usually a big flood, which doesn't last as long as the ordinary flood, and that ordinary flood water covers his land, sometimes an inch, sometimes a foot (pages 349-350). It must be apparent to the court that a foot of water is not needed for the successful wetting of land. An inch of water flowing over it is as good as a foot, provided it flows long enough; and that extra water which inundates Harney Valley on the

crest of the big flood is the very water the respondent is after.

Frank Whiting, a witness for the respondent, says that sometimes the water would be out of the river belly-deep, or mid-sides deep, for a mile across the valley (page 618). E. L. St. Clair, a witness for the respondent, shows that the flood water extends out into the country for several miles. The appellants contend that any excess of water, no matter how deep, doesn't injure the crop (page 217), whereas one of their main contentions in the other suit (2036) is that Hanley insists on drain ditches and dykes to keep the surplus flood water from getting too deep and cold on his land; and George Craddock shows this injury to the crop and the excess of flood water (pages 536 and 537). Gilcrest himself testifies that Hanley's drain ditch is full at the flood time, carrying off the excess water to its full capacity (pages 325-326). W. D. Hanley, one of the principal men back of the appellees' irrigation enterprise, testifies that the flood season varies, and he would say the big general flood comes from the 15th of March to the 15th of April; that in a cycle of ten years there would be five high floods, three light floods and two very low floods (pages 733-4), but that every year the water goes east of his line into the edge of the black sagebrush (page 735). Mr. Hanley has been in the country since the time it was Indian country, June, 1879; started the first irrigation that was ever done in the country, and the first farming without irrigation, and was the first to raise cereals. Making every allowance for interest, his entire testimony will show that he is the best equipped witness on facts who took the stand (pages 707-723). On page

725 he shows that during flood time every slough is running bigger than the river itself, draining water into the swamps and lakes which ought to be led out onto the desert. On page 738 he shows the difficutly in handling the surplus water, and pages 741 and 742 shows the beginning of the enterprise for reclaiming these sagebrush desert lands, and that there was a great deal of surplus water coming out of Foley Slough which no one was putting to any use (page 741). On page 766 he also shows the injury from too much water. On page 809 he shows that Foley Slough carries three or four times as much as the river itself in high flood years, and continuing, pages 810, 812, 814, 816, he goes on to show that all this water finally gets into Malheur and Harney Lakes; he shows that the Blitzen River runs through the very property of which he is manager, that he is very familiar with it, and that Silvies River in low water years furnishes about half the waters of the lakes, but in high water years furnishes a big two-thirds; and commencing with page 816 he goes on to show that the plan of the respondent is to divert this useless and surplus water which makes these swamps and lakes and carry it out onto desert country that at the present time is worthless by reason of lack of water. On page 817 he says, "I mean by surplus water that water which is unused or unappropriated by anyone else, and the water that goes into Malheur and Harney Lakes; truly waste water." He also says that in addition to these lakes a big part of the country is marshes, swamps, tule, flag and sugar-grass, all of which mean, really, a swampy condition, produced by too much water. And on pages 817 and 818 he says he has no intention of trying to touch anyone's

present right of irrigation, but simply wants to use the waste water that does much harm by raising waste products in the form of tules, flags and water-grasses and in forming lakes; and on page 818 says, "In my judgment there is enough water to practically reclaim the valley if it was put under the management and development of an economcial system." Continuing, page 818, *et seq., he* shows his actual experiments and experience with this flood water irrigation, producing from ten to twenty bushels of grain per acre, and that it will get better as time goes on. And commencing with page 821 he describes the width of the irrigation canal and the plan of projected work. Mr. Hanley's whole examination, especially the cross-examination, is well worthy the attention of the court.

We do not believe it is within the right of the appellant to have the flood waters come to its land as they have always come, making a natural hay crop on natural hay land, with a great excess of water which goes to waste in forming these lakes and marshes, but we believe both strict private right and large public policy require that the appellant use the water economically and scientifically, and that it has a right to no more water than it is entitled thus judicially to use. We point to the overwhelming facts of the existence of these lakes, the existence of over six thousand acres of swamp, on the appellant's own land, which are admitted to be several miles from the lake, as proof conclusive that at some time of the year surplus water is going to waste. Or, put it another way: One of the government's original reclamation plans, not carried out for lack of funds, was to store the very waters that make these lakes and swamps,

and allow only enough to come down to supply the needs of cultivators. Will this cattle company, in such an event, be permitted to block this great storage enterprise merely that it, as the lowest owner, may remain master of the river and require all water to come to its acres and let it go to waste in vast areas of swamp land which, though they suit the private purposes of this cattle company well enough are, so far as human progress is concerned, a double waste—a waste of the swamp land itself and a waste of the water which makes it. We earnestly ask this court, if it takes jurisdiction of this appeal, to dissolve the injunction entered against us and permit us to at least make the experiment, to see if we can reclaim one hundred and fifty thousand acres of desert land, as Mr. Hanley thinks we can. Real conservatism ought to allow us to at least make the experiment. Then, if it turns out that we are mistaken, and there is no surplus water, we are the only ones injured; and it seems to us that the present decree, which blocks an enterprise even before its results have been tested by experinc, is inequitable, and certainly not warranted by the great physical facts which are in evidence and which no one can dispute.

We call attention to the fact that of all the testimony adduced by the complainant the only witnesses who were ranchers and who testified to water conditions are Barnes, Bunyard, Hill, Creasman and F. L. Mace; and not one of these testifies to the question of surplus water, unless perhaps Mr. Hill's testimony might be interpreted as touching upon that issue. They are really testifying about the Hanley situation. All the rest of complainant's witnesses are its employes—Bodle, Clark, Bart Cronin,

Charles Cronin, Gilcrest, Holland, Love and the civil engineers, Johnson, Foster, Faulkner. The independent ranchers who testified for the respondents are Brown, Cox, Denstedt, Fry, Hopkins, Houser, James Lampshire, Stephen Lampshire, H. B. Mace, McPheeters, Pirie, Smith, St. Clair, Varien, Wallace, Whiting and Wood. Levens is one of the parties respondent in the Hanley case and Craddock was formerly employed by Hanley. An examination of the testimony of these men will show that in reality the appellant stands alone in that country in its effort to block this reclamation enterprise. As already stated, if there is anything we can do by consent to enable the court to take cognizance of this case as an entirety upon a complete record we are glad to do it, as we are very dissatisfied with the decree as it stands. It ties our hands completely until proceedings of a necessarily slow and tedious nature are completed, and we believe the welfare of Harney Valley requires that this surplus water be put to use instead of making swamps. But we regret to say that it is not, in our opinion, an appealable part of the decree, and therefore we feel obliged to renew the following motion:

THE APPELLEE MOVES TO DISMISS THE APPEAL FOR THE REASON THAT THE PART OF THE DECREE APPEALED FROM IS DISCRETIONARY WITH THE COURT BELOW AND IS NOT APPEALABLE; AND THIS COURT CANNOT PROPERLY UNDER THE RULES OF EQUITY JURISPRUDENCE TAKE JURISDICTION. AND ALSO MOVES AGAINST A DIMINUTION OF THE RECORD

AND FOR ITS COMPLETION BY REQUIRING THE CLERK OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON TO TRANSMIT TO THIS COURT A FULL AND COMPLETE TRANSCRIPT OF ALL THE TESTIMONY TAKEN IN THIS CAUSE AND FILED IN HIS COURT, TOGETHER WITH ALL EXHIBITS FILED AS A PART OF THE RECORD IN THIS CAUSE, AND ALSO THE STIPULATIONS OF THE PARTIES AND THE REPORT OF THE MASTER IN CHANCERY, WALLACE McCAMANT, UPON EXCEPTIONS TO THE BILL.

A party cannot appeal where the determination complained of is merely the result of the exercise of judicial discretion on a matter fairly subject to the exercise of discretion.

2 Daniell's Chancery, 1462, 1463 (4th Ed.).

Application to reopen a cause is addressed to the discretion of the court, and an appeal does not lie from an order either granting or denying such application.

Street, Federal Equity Practice, Section 2083.

No apepal lies from a matter which rests with the sound discretion of the court below, as refusal to open a former decree.

Terry v. Commercial Bank, 92 U. S. 454.
Brockett v. Brockett, 2 How. 238, 240.
MacMicken v. Perin, 18 How. (59 U. S.) 507, 511.
Wyle v. Coxe, 14 How. 1.
Steines v. Franklin Co., 14 Wall. 1522.

Most of these cases relate to an appeal from a court's refusal to open a decree when within its power to do so. Naturally, the opening of the decree would stand upon the same footing. An appeal does not lie from an order of the chancellor refusing to vacate an order that a bill be taken *pro confesso.*

Rowley v. Van Benthuysen, 16 Wend. 369.

Exceptions to a master's report addressed to the discretion of the chancellor cannot be reviewed on appeal.

Merriam v. Barton, 14 Vt. 501-514.

The ordering of an issue to be submitted to a jury in a suit in equity is an exercise of judicial discretion and not appealable.

Ward v. Hill, 4 Gray, (7th Mass.) 593.
Crittenden v. Field, 8 Gray (74 Mass.) 621-626.

But why multiply citations to this court upon so well settled a proposition?

Respectfully submitted,

C. E. S. WOOD,
LIONEL WEBSTER,
Of Counsel for Appellees.

WILLIAMS, WOOD & LINTHICUM,
LIONEL WEBSTER,
Solicitors for the Appellees.

APPENDIX

The Following Motions and Certificates are Filed in this Court and Cause:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Pacific Live Stock Company (a corporation),
Appellant,

v.

The Silvies River Irrigation Company (a corporation) and Harney Valley Improvement Company (a corporation),
Appellees.

Now come the appellees, by C. E. S. Wood and Lionel Webster, their solicitors, and move the court that the appeal be dismissed for lack of jurisdiction, for the reason that the portion of the decree appealed from lay within the judicial discretion of the trial court.

And appellees also move against a diminution of the record, and show to the court that the testimony and exhibits in this cause are not before the court so that the court can proceed as upon a trial *de novo*, and refer to the certificate of the Clerk of the Circuit Court of the United States for the District of Oregon, filed herewith.

C. E. S. Wood,
Lionel Webster,
Solicitors.

United States of America, }
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that there is on file in the records of said court in my custody, in cause No. 3276, Pacific Live Stock Company, plaintiff, v. Silvies River Irrigation Company, defendant, one volume of testimony consisting of 601 pages, to which is attached a certificate of the special examiner appointed

to take the testimony in said cause that said volume contains a full, true and impartial record of the shorthand notes of the testimony, objections, stipulations and introduction of exhibits in said cause; and I further certify that there is also on file in said cause in said court all the exhibits introduced in evidence in the taking of said testimony.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 6th day of November, 1911.

(Seal.) G. H. Marsh, Clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Pacific Live Stock Company, a corporation,
Complainant,

v.

Silvies River Irrigation Company, a corporation, and Harney Valley Improvement Company,
a corporation,
Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the testimony to be taken by the special examiner pursuant to an order of this court duly made and entered in a certain cause wherein Pacific Live Stock Company is complainant and W. D. Hanley *et al.* are defendants, may be used in this cause by either party.

Dated this 29th day of June, 1910.

Teal & Minor,
Solicitors for Complainant.
Lionel R. Webster,
C. E. S. Wood, of
Solicitors for Defendants.

Stipulation filed June 29, 1910.

G. H. Marsh,
Clerk U. S. Circuit Court, District of Oregon.

United States of America,
District of Oregon. } ss.

I, G. H. Marsh, Clerk of the United States Circuit Court for the District of Oregon, do hereby certify that the foregoing copy of stipulation in cause No. 3276, Pacific Live Stock Co. v. Silvies River Irrigation Co., has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this November 6, A. D. 1911.

(Seal.) G. H. Marsh, Clerk.

No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY (a corporation),

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a corporation),

Appellees.

REPLY BRIEF FOR APPELLANT.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellant.

Filed this.....day of November, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY (a corporation),

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a corporation),

Appellees.

REPLY BRIEF FOR APPELLANT.

The brief for appellees not having been filed prior to the argument, the court granted appellant leave to file a reply thereto, and pursuant to such leave we now briefly reply to the points suggested by that brief. The appellees have also suggested a diminution of the record and ask that the entire evidence taken in the case be certified to this court. We will likewise reply to that matter in this brief.

I.

THE CONTENTION THAT THE MATTER INVOLVED IN THE APPEAL WAS WITHIN THE DISCRETION OF THE COURT AND NOT APPEALABLE IS UNFOUNDED.

It is not disputed by counsel, but on the contrary expressly admitted, that appellant is entitled to appeal from a particular portion of the decree which is adverse to it, but it is argued that the subject matter in question is not subject to an appeal because entirely within the absolute discretion of the trial court. It cannot be disputed that the appellant is the owner of certain important rights in the Silvies river and that as a riparian owner of land bordering upon it and as an actual user of the water of the river it is entitled to invoke the aid and authority of a court of equity in the protection of those rights. Prima facie, it is entitled to the full benefit of the natural flow of the water of the river past and over its lands. In support of that right it filed its bill in this case, and it was incumbent upon the defendants to set forth what right they had or asserted in the waters of the stream, and it was therefore necessarily incumbent upon the court to determine whether or not those rights existed and whether or not they were superior to the rights of the complainant, and if not it was its duty to enjoin the exercise of the rights claimed by the defendants. The defendants did appear and did set up their asserted rights, namely: their asserted right to divert any surplus water over and above the amount actually used by complainant and other persons using the water of the stream. It was therefore the bounden

duty of the court to determine whether or not there was any such surplus water, and, if so, whether or not the defendants were entitled to divert it as against the rights of complainant, and that duty was not one resting in discretion of any kind or character. This seems so clear that argument would appear to be unnecessary, and we think it will hardly surprise the court to find that the authorities cited by appellees in no way support the contrary contention.

The following cases cited by appellees to wit:

McMicken v. Perin, 18 How. (59 U. S.) 507;
Wyle v. Coxe, 14 How. 1;
Steines v. Franklin County, 14 Wall. 15;
McLeod v. City of Albany, 66 Fed. 378;

went simply to the point that an application to the trial court for a rehearing is addressed to the discretion of the court.

In the case of *Terry v. Commercial Bank,* 92 U. S. 454, relied upon by appellees, it was simply held that a motion made after final decree was addressed to the discretion of the court.

In the case of *Barr v. Gratz,* 4 Wheat. 213, it was simply held that refusal to grant a new trial was not ground for a writ of error. So the cases cited in 2 Daniell's Chancery Practice, 1462-3, cited by counsel, all refer to orders granting or refusing a rehearing, granting or refusing temporary injunctions, granting or refusing petitions for intervention, and granting or refusing orders appointing receivers, etc. It is therefore perfectly

clear that such cases are no authority whatever in favor of the position of appellees.

Counsel also cite certain cases to the point that the court may in its discretion reserve certain matters for further consideration. All those cases, however, on examination will be found to be cases where matters as to accounting, administration of funds and matters of that kind, are reserved for further consideration. No case can be found where it is held that the court can reserve the only issue in the case. In fact, as is stated by Daniell in the section cited, "The general rule of the court " is to make a complete decree upon all points con- " nected with the case". But in this case the court did more than reserve something for further determination, for it reserved the right to the defendants to go into some other court or "appropriate tribunal" and there have determined the very matter in litigation in this case, and thereupon to come in and have vacated the final judgment to which the court had already decreed we were entitled in this case.

II.

THE CLAIM THAT UPON AN APPEAL BY ONE PARTY FROM A PART OF THE DECREE THE OTHER PARTY MAY REOPEN THE ENTIRE CASE AND HAVE REVIEWED THE PORTION OF THE DECREE WHICH IS AGAINST HIM IS UNFOUNDED UNDER THE PRACTICE IN THE FEDERAL COURTS.

It is true that the cases cited by counsel under the old chancery practice held that an appeal by one party from

a part of the decree in equity reopens the entire case and permits the appellee to have reviewed the portion of the decree which is adverse to him, but that rule does not prevail in the federal courts. Under our system any person dissatisfied with a decree of the Circuit Court must file his assignments of error, and if he relies upon the insufficiency of the evidence to sustain a particular finding, his specifications must point out the particular finding which he claims is unsupported by the evidence. In this case the court found in favor of the complainant and against the defendants on the only issue of fact in this case and granted an injunction in favor of complainant and against the defendants accordingly. If the defendants desire to review that finding they must file specifications of error directed to the finding in question and pray for a reversal of the decree and obtain permission to appeal therefrom. None of these things have been done by the defendants, but on the contrary they have apparently entirely acquiesced in the finding and decree. Under these circumstances it is well settled under the practice in this court that upon our appeal the appellees cannot assail the findings or decree so far as they are in our favor.

An appellee who does not take an appeal, and a defendant in error who does not sue out a writ of error, can not confer jurisdiction upon an appellate court to consider or review rulings adverse to him upon questions suggested by an assignment or argument of cross errors,—he may be heard only in support of the order, decree or judgment below.

Board of Commissioners v. Hurley, 169 Fed. 92.

Where each party appeals each may assign error; but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard except in support of the decree from which the appeal of the other party is taken.

The Maria Martin, 12 Wall. 31, 20 L. ed. 251.

A party not appealing from the decision of the district court can in this court only be heard in support of the decree of the court below.

Bush v. The Alonzo, Fed. Cases 2223.

Assignments of error by the appellee in a case in equity cannot be considered unless an appeal is taken by him.

Building & Loan Association v. Logan, 66 Fed. 827.

The court cannot notice errors assigned in the brief of counsel for appellees in an equity case.

Clark v. Killian, 103 U. S. 766; 26 L. ed. 607;

Guarantee Company v. Insurance Company, 124 Fed. 172;

U. S. v. Blackfeather, 155 U. S. 180, 39 L. ed. 114;

The Stephen Morgan, 94 U. S. 599; 24 L. ed. 266;

Cleary v. Ellis F. Co., 132 U. S. 612, 33 L. ed. 473;

Bolles v. Outing Co., 175 U. S. 262, 44 L. ed. 156.

Appellees cannot be heard to assail the judgment below since they did not appeal.

Southern Pine Company v. Ward, 208 U. S. 126; 52 L. ed. p. 420;

Field v. Barber Asphalt Co., 194 U. S. 618; 48 L. ed. 1142.

No one but the appellant can be heard in the appellate court for the reversal of the decree.

New Orleans etc. Co. v. Fernandez, 20 L. ed. 249.

III.

THE MOTION AGAINST A DIMINUTION OF THE RECORD IS NOT WELL FOUNDED.

In this case the appeal being from one separate part of the decree, the trial court made an order designating what should constitute the record on appeal as follows: "said record to consist of the pleadings and final de- "cree in said cause and said petition for appeal, as- "signment of errors, undertaking on appeal, order al- "lowing the appeal, citation on appeal" (Trans. p. 43). Appellees have never moved to have this order in any way modified, and after the record was transmitted to this court, printed and delivered to appellees, they took no proceedings to obtain the balance of the record until the argument in this court. It is not claimed that the balance of the record is necessary in order for the court to pass upon the portion of the decree appealed from, but it is sought to have the balance of the record sent

up in order that the appellees may assail the portion of the decree which is against them and as to which they have not appealed. As we have shown, it is not available to them to review the balance of the decree, and therefore the motion is clearly unfounded.

But even if that were their privilege they should not be permitted at this stage of the case to insist upon having the entire record transmitted to this court. Under the provisions of Sec. 698 of the United States Revised Statutes, it is provided that the transcript of the record shall only contain such parts of the proofs "as may be necessary on the hearing of the appeal". Paragraph 3 of Rule 8 of the Supreme Court provides that only such proceedings need be included as are "necessary to the hearing in this court". The practice in the Supreme Court applies in the Circuit Court of Appeals (Rule 8 of the Circuit Court of Appeals of the 9th Circuit), and by paragraph 3 of Rule 14 of the Circuit Court of Appeals of the 9th Circuit it is provided that the record need only contain such proceedings as are "necessary to the hearing in this court".

The words "as may be necessary on the hearing of the appeal" apply to the proofs or evidence and only such proofs and evidence as may be necessary to the hearing of the appeal need be included in the record.

Nashua etc. Corporation v. Boston Corporation, 61 Fed. 237 (Circuit Court of Appeals, First Circuit);

Missouri etc. Ry. v. Dinsmore, 108 U. S. 31; 27 L. ed. 640; 2 Supreme Court 9.

The attorney for the appealing party in the first instance is the judge of what papers are necessary. If the clerk is in doubt he may obtain instructions from the trial court. If the party appealed against is dissatisfied he has his remedy by mandamus, suggestion of diminution of record and certiorari.

Nashville etc. Corporation v. Boston etc. Corporation, 61 Fed. 237, 245;
Gregory v. Pike, 64 Fed. 417;
Hoe v. Kahler, 27 Fed. 145,

or the appellate court may direct the proper papers to be filed on pain of the appeal being dismissed.

Florida etc. R. R. Co. v. Schulte, 10 Otto 644;
Gregory v. Pike, 64 Fed. 417;
Rodgers v. United States, 152 Fed. 426;
Flickinger v. First National Bank, 145 Fed. 162;
Kansas v. Meriwether, 171 Fed. 39.

The Supreme Court has condemned the practice of bringing up unnecessary papers.

Railway Co. v. Stewart, 95 U. S. 279, 284;
Craig v. Smith, 100 U. S. 226, 230;
The Adriatic, 103 U. S. 730;
Ball etc. Co. v. Kraetzer, 150 U. S. 111, 118.

And has approved a modified certificate of the clerk certifying to such papers as are necessary.

Hodges v. Vaughn, 19 Wall. 12;
United States v. Gomez, 1 Wall. 690;
The Rio Grande, 19 Wall. 178.

It therefore clearly appears that the appellees have acquiesced in the decree so far as it is against them,

have filed no specification of errors in respect thereto, have not appealed therefrom, have permitted the trial court to make an order prescribing what should constitute the record on this appeal, have permitted the appellant to file its brief on that record and have not taken any steps to transmit to this court the portion of the record which they now desire the court to review to assail the part of the decree which is against them. Certainly the appellant was entitled to assume under these circumstances that they were satisfied that they could not reverse the decree, and if they desire to do so upon our appeal it was certainly their duty to see that that part of the record was transmitted to this court before the case was briefed and argued, otherwise the appellate court would have an entirely new and different question presented to it without any oportunity to the parties to argue the same.

IV.

THE RECORD IN THE CASE OF PACIFIC LIVE STOCK COMPANY vs. W. D. HANLEY ET AL.

In order to review the finding of the trial court that there was no surplus water not beneficially used, appellees have imported into the case a stipulation entered into between the parties in the trial court to the effect that the testimony in the Hanley case might be used by either party in this case, and then proceed to refer to the record in the latter case and attempt to show from that record that as a matter of fact there is a surplus

of water, although they also show that in this case there was taken 601 pages of testimony which is not before this court and although they admit that the matter of such surplus water was in no way involved in the Hanley case. It would therefore be a waste of time for us to follow counsel in their strained effort to prove such surplus water from the testimony in the Hanley case, but we will simply state that the evidence actually introduced in this case showed conclusively that there was no surplus water, notwithstanding the testimony of Hanley, which is relied upon by the appellees.

We believe that the foregoing answers all of the matters contained in the brief for appellees which are material to this appeal.

Respectfully submitted,

Wirt Minor,
Edward F. Treadwell,
Solicitors for Appellant.

No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY (a corporation),

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a corporation),

Appellees.

PETITION OF APPELLANT FOR REHEARING.

WIRT MINOR,
EDWARD F. TREADWELL,
Solicitors for Appellant and Petitioner.

Filed this.....day of November, 1912.

FRANK D. MONCKTON, Clerk

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 2029

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC LIVE STOCK COMPANY (a corporation),

Appellant,

vs.

SILVIES RIVER IRRIGATION COMPANY (a corporation) and HARNEY VALLEY IMPROVEMENT COMPANY (a corporation),

Appellees.

PETITION OF APPELLANT FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Pacific Live Stock Company (a corporation), the appellant in the above entitled cause, hereby respectfully petitions for a rehearing of said cause for the reasons set forth in this petition.

Reducing this case to its simplest form, it appears that the Pacific Live Stock Company, being the owner of a large amount of land riparian to Silvies river, brought this suit against the defendants to enjoin a threatened diversion of a large quantity of the waters of the river. The complaint alleged a great benefit of the water of the river to said land, and the irrigation of the land thereby, and the production of valuable crops thereon.

The defendant claimed no right to the water of the stream except as an intended appropriator thereof, and claimed that it could appropriate the water without in any way injuring the complainant.

The case was tried and the court entered a decree in which the court expressly found the ownership of the land, the irrigation thereof, that

> "ALL of the water of Silvies river is necessary for the irrigation of complainant's land and the lands of others irrigated from the waters of said river as above described and which are annually irrigated by the waters of said river if undisturbed, and by the diversion contemplated by the defendants of the water of Silvies river the complainant and others owning lands irrigated from said river as above described will be deprived of valuable feed and crops, their lands rendered less valuable *and the complainant will be greatly damaged and injured.*
>
> "Unless the defendants be enjoined from perfecting their diversion and taking the waters of said river they will continue the construction and maintenance of their ditch and by means thereof will divert waters of said river and will carry the same to and use the same upon non-riparian lands not now naturally irrigated by the waters of said river through said ditch and deprive the complainant and

> others owning lands naturally irrigated from said stream of the use and enjoyment of the waters of said stream, *and such diversion of the waters of said river by defendants and the deprivation of the complainant of the use and enjoyment of said rivers will cause great and irreparable damage and injury to the complainant.*"

The court thereupon entered a decree entirely enjoining the defendants from diverting the water. That part of the decree being in favor of the complainant, complainant naturally could not appeal therefrom, and so far as the defendants were concerned, they have not appealed from the decree, nor have they in any way questioned the correctness of the findings of the court on this subject. Under the well-settled rule of this court, no finding can be reviewed on appeal unless it is properly attacked by specification, and in passing on an appeal the court is bound to accept as final any finding, either express or implied, which is not attacked by specification. It therefore results that so far as this court is concerned, it has before it a decree containing an express finding that all of the water of this river is necessary for the complainant; that it is highly beneficial to it, and that to deprive the complainant of the water would cause it great and irreparable damage. But not only has the court given such a decree, but it is perfectly obvious that if the trial court had refused to give such a decree and the complainant had appealed, this court necessarily would have been compelled to reverse the decree if the facts were as found by the court herein.

THE CASE OF EASTERN OREGON LAND CO. V. WILLOW RIVER LAND AND IRRIGATION CO.

This can not be more aptly shown than by the decision of this court in the case of *Eastern Oregon Land Co. v. Willow River Land & Irrigation Company,* which was decided upon the same day that the case at bar was decided by this court. That case was tried before the same judge who tried the case at bar, and from the evidence in that case he held that the complainant did not need the water, and that it would not be injured by the diversion thereof by the defendant. On appeal, this court laid down the rule that it was well settled by the decisions of the Supreme Court of Oregon that a riparian owner was entitled to the full natural flow of the stream, so far as it was beneficial to his land, and that this was true of the ordinary flood waters as well as the waters at the lower stages of the stream, and Mr. Justice Ross in his concurring opinion in that case also admitted that under the law of the State of Oregon the riparian owner was entitled to the flow of the stream so far as it was beneficial to him.

The court thereupon examined the evidence and from the evidence found that the flow of the stream in that case was beneficial to the complainant, and that to deprive the complainant of the water would injure it, and thereupon reversed the decision of the trial judge. Certainly the determination of this court in that case from the evidence that the water was beneficial to the complainant and its diversion would cause it injury can be no stronger than the findings in this case to the effect that all of the water is necessary to the com-

plainant, that by it valuable crops are produced and that to deprive it of the water would cause great and irreparable injury. It necessarily results that whether the trial court did or did not give the complainant an injunction upon these findings the complainant was absolutely entitled to such an injunction under the rules of law well settled in the State of Oregon, and admitted by this court to exist in the case last above cited, and certainly the complainant here should not be placed in a worse position when the trial court granted it the injunction than it would have been if the injunction had been refused.

Surplus Water.

So far as the complainant was concerned, all that it had to show in order to be entitled to the injunction prayed for was that this water, either as it naturally overflowed the land or as it was made to artificially overflow the land, was beneficial to the complainant, but it appears from the answer of the defendants that they attempted to interject into the case an additional feature, namely: that there was in the stream surplus water or more water than was necessary to irrigate the complainant's land, and the lands of others on the stream. The court can readily see that in one sense this might be true, and still the right of the complainant to an injunction in no way be affected. In other words, it might be shown that this stream naturally and artificially overflowed the lands of the complainant and other persons, and that if the defendants took out the water they claimed it would no longer overflow those

lands and the lands would thus be destroyed. At the same time it might be true that if all the people on this river would construct expensive irrigation works, such as reservoirs, diverting works, canals, etc., and then apply the very highest duty to the water, it might be made to irrigate more land than was actually irrigated. But it must be obvious that such a surplus as that would not disentitle the complainant to an injunction. In other words, assuming that the river when flowing at a certain stage will naturally overflow the lands of the complainant, and will thus naturally irrigate and benefit the lands, whereas one-half of that water would irrigate them providing the complainant constructed expensive diverting works and canals, to hold that it should be deprived of its natural advantage for that reason would be directly contrary to the rule laid down in the case above referred to, that the riparian owner is entitled to the natural flow of the stream so long as it is beneficial to him.

In other words, the only ultimate question of any importance in any case brought by a riparian owner to enjoin a threatened diversion by a trespasser is this: Is the water beneficial to the complainant, and will he be damaged if it is taken away? An affirmative answer such as was given in this case to that question necessarily determines the case and entitles the complainant to the injunction prayed for.

But while we were certain of this position, we very properly joined issue with the defendants on the issue they attempted to raise, and the evidence introduced

was applicable of course not only to the real issue in the case, but to the peculiar issue raised by the defendants. On that issue the court filed its opinion in which it said:

> "The defendants claim the right to take the surplus water only and disclaim any intention of interfering with the rights of any of the settlers; *but it is not shown that there is any surplus water.* The evidence in this case tends strongly to support the complainant's position that all of the water is necessary for the irrigation of the land in private holdings and which is annually irrigated by the overflow if undisturbed."

In view of the express finding of the court that all the water is necessary to the irrigation of complainant's land, and that complainant will be irreparably injured without the water, even if in any other sense there could be surplus water, the burden was certainly upon the defendants to establish that fact, and when the trial court finds that it is not shown that there is any surplus water, it necessarily, from a legal standpoint, so far as this particular case is concerned, decides that there is no surplus water. In other words, a case in court is to be tried by the evidence introduced. If the defendants failed to prove their case, that is no fault of the complainant, and it is no fault of the trial court or of this court, and when the court expressly found that all the water of the river is necessary for the irrigation of the lands irrigated, it necessarily found that it was not shown that there was any surplus water, and therefore from a legal standpoint, so far as this case is concerned, that there was no surplus water.

The Record.

The court having expressly found that all the water was necessary to the complainant, and that to divert it would cause it great and irreparable injury, the complainant properly took the position on this appeal that it was useless to bring up the evidence on those two issues. Clearly the complainant could not attack the findings on those issues because the findings were in its favor. The defendants could not attack those findings because they had not in any way filed assignments directed against them.

It would have been equally absurd for the complainant to have appealed from the portion of the judgment which enjoined and properly enjoined the defendant from diverting water which the court found was necessary for the irrigation of the complainant's land, and the diversion of which the court found would cause the complainant great and irreparable injury. The complainant therefore simply appealed from the portion of the judgment which in effect provided that if in some other proceeding and in some other tribunal, and upon other evidence, it should be determined that there was a surplus of water which could be diverted without injury to complainant, then the defendants might apply for a vacation of the injunction.

The lower court also properly determined that on such appeal the only question was one of law, whether or not under the facts found this was a proper provision to insert in the decree, and the court thereupon provided that the record on the appeal should consist

simply of the pleadings, final decree and appeal papers (Record, p. 41).

The question, therefore, presented on this appeal is simply this: In a case where the lower court has made findings which not only sustain an injunction but which absolutely require its entry as decided by this court in the Eastern Oregon Land Company case, and the findings upon which that injunction is based are in no way questioned or open to review, and where there is no appeal whatever from the judgment granting the injunction, is it proper for the court to give leave to the parties to re-open the case if some other tribunal on other evidence shall find to the contrary to the facts found by the court? If it is not proper then that part of the judgment should be reversed, but *such reversal should in no way affect the injunction which has already been entered and properly entered upon the findings in the case.*

JUDGMENT HEREIN REVERSES THE JUDGMENT NOT APPEALED FROM.

The jurisdiction of this court is entirely appellate, and this court has no jurisdiction to in any way interfere with a judgment which has not been properly appealed from to this court. The judgment in favor of the complainant in this case enjoining the defendants from diverting this water, and necessarily containing an adjudication that the defendants under the evidence in the case were not entitled to divert the same, has

never been appealed from by either party to this court. Nor have the findings upon which it is based ever been attacked by any party in the lower court or in this court. The only appeal in this case is from an independent provision in the decree which goes on this theory: The trial court decides that from the evidence all the water is necessary for the complainant, and that to divert it or any part of it would cause the complainant great and irreparable injury. The court, therefore, properly enjoins the same, but anticipating that at some future time in some future proceeding in some other tribunal it may be determined that the facts are otherwise, it grants leave to the defendant to apply for a vacation of the injunction in that event. That part of the judgment in no way weakens the determination of the court of the propriety of the injunction under the facts as found by the court. It simply reserves to the defendants the right to apply to the court for a vacation of it under new circumstances. If that is proper to be done, then that part of the judgment should be affirmed. On the contrary, if, as we argue, it is improper to reserve any such right to the defendants, then that part of the judgment should simply be reversed as being a matter which never should have entered into the judgment in any way.

But, as a matter of fact, this court in its judgment has reversed the "judgment" without limiting its reversal to the part of the judgment appealed from and remands the cause

> "with directions to allow the parties a reasonable time to take proceedings under the above mentioned

> statute of the State of Oregon, and in the event they do not proceed therein within a reasonable time to require all parties in interest to interplead herein and then to proceed to a determination of the issues between them in accordance with the laws of the said state".

This necessarily involves these matters: *First.* A judgment is apparently reversed in its entirety when only a part of the judgment has been appealed from. *Second.* A judgment is reversed which is based on findings supporting and requiring its entry, although the judgment is not appealed from, nor are those findings attacked by specification, or otherwise. *Third.* It allows the parties who are already impleaded in this court and entitled to have their rights determined therein to transfer the subject matter of the litigation to a state tribunal; and, *Fourth.* It requires the court, although the case has been tried and findings of the court made and a judgment entered, which are not attacked in any way, to bring in all parties interested in the water of Silvies river, and then to proceed to a determination of any issues which may be raised between them.

It seems to us that this is not only an improper disposition of this appeal, but one entirely beyond the jurisdiction of the court. As we have said, this court can not reverse a judgment which has not been appealed from. If the court holds that the part of the judgment appealed from is not separable from the rest of the judgment it necessarily results that our appeal was futile and abortive, and should either be dismissed

or the part of the judgment appealed from affirmed. But that it is separable is perfectly clear, for it assumes the propriety of the judgment enjoining the defendants but simply grants to the defendants a permission under certain circumstances to move to vacate the same, and the sole question therefore is not the propriety of the judgment of injunction but the propriety of the reservation of this right to the defendants, which is clearly a separable proposition.

STATUTE OF 1909.

So far as the portion of the decree relates to the permission given to the parties by this court to proceed under the Oregon statute of 1909, it appears that this case was commenced on the 29th day of March, 1908, or about a year before the passage of the statute in question. The complainant being a non-resident of the state was entitled to invoke the jurisdiction of the federal court to enjoin this threatened invasion of its rights. It invoked that jurisdiction and tried its case in the ordinary way, and is entitled to a judgment upon that submission. This court certainly can not mean to decide that the jurisdiction of the federal court is in any way affected by the statute of Oregon providing a certain special state tribunal to adjudicate water rights, and the federal courts can not abdicate their jurisdiction nor deprive a non-resident of the right to have a decree entered protecting its rights against invasion. This court directs the lower court to allow

the parties to take proceedings under the state statute. It does not say that all of the parties to this suit are to join in such a proceeding, or whether it would satisfy the requirements of this court if the defendants, for instance, should initiate such proceeding and bring the complainant in as an adverse party thereto. If such is the meaning of the judgment of this court, then the jurisdiction of this court would be ousted by a subsequent proceeding brought by one of the parties litigant against the other party litigant involving the same subject matter, a condition of things that certainly never could have been contemplated.

The court certainly can not assume that the complainant in this case, after having at great expense tried this case and obtained a favorable finding and decree enjoining this infringement of its right, will voluntarily submit itself to any other tribunal, and if the judgment of this court in this particular means that the court is to allow all of the parties by agreement to inaugurate proceedings under the state statute, it might be harmless, but it certainly should not be left in its present uncertain condition.

Assuming that this is its meaning and that the parties do not avail themselves of the privilege accorded them, then instead of directing the trial court to enter the judgment which is proper to be entered under the evidence taken the court not only wipes out the present judgment and the present findings supporting it, but also wipes out all the proceedings in the case and requires that hundreds of new parties be brought into the

case and then the case proceeded with *de novo*. It is difficult to see any authority for the reversal of a judgment on the ground that other persons were proper parties to the suit where no plea of any kind has ever been interposed to the non-joinder of such parties, and no application has been made in the lower court for the bringing in of additional parties, and where no appeal has been taken from the judgment by the only party who could complain of the judgment. Of course, no one would say for a moment that in case a riparian owner is threatened with invasion by having his water taken away from him that before he can enjoin the use he must join as parties every one interested in the waters of the stream. Such a rule would not only be entirely impracticable, but it is entirely contrary to numerous decisions of the courts, and contrary to every principle of law. The right of the riparian owner is part of his land itself and he is entitled to protect that right against a trespasser, and under numerous decisions of every court in which the matter has arisen it has been uniformly held that he may maintain an action alone to enjoin such diversion. Not only that, but the complainant in this case could only maintain this suit where proper diversity of citzenship existed. Such diversity may not exist between the complainant and other users of the water. It is not likely that all parties in interest would voluntarily join with the complainant as parties complainant, as much of the land irrigated from this river is far above the point of diversion of the defendants, and there is no reason for the court to believe that they could be made parties defend-

ant. In fact it is difficult to see on what basis the complainant could justify the joining of these parties as defendants. They have not infringed the rights of the complainant. The complainant simply has certain rights and takes the position, which it has a right to take, that those rights are being interfered with by the defendants. It could not bring such a suit against people who had not interfered with its rights, and it certainly should not be compelled by the court to force people into court who are not interfering with its rights, and with whom it has no dispute.

We take it for granted, therefore, that this court can hardly mean that the lower court can in any way compel the complainant to bring these parties in as defendants or as plaintiffs. The only way, therefore, that they could be brought in would be by cross-bills filed by the defendants, but in that event the defendant would be turning the action into one to determine the rights of other parties which would be entirely immaterial to the suit, since if defendants are interfering with our rights they should be enjoined, irrespective of the rights of other parties.

We would have been glad to have the presence of all other owners on this river to oppose the invasion made by the defendants, but we know of no way in which we could bring them in, unless we allege that they were invading our rights and we are not in a position to allege anything of the kind. But if their presence was of any benefit to the defendants they should have brought them in before the case was tried and went to

judgment, and it is too late, we submit, after the case has gone to judgment and that judgment has not been questioned by the defendants, for them to ask this court to bring in new parties. In fact, they have not even had the hardihood to ask for anything of the kind, but the permission is one which has been granted to them by this court without any appeal on their part.

ACT OF 1909 DOES NOT AFFECT PENDING SUITS.

It is provided by section 1, subdivision 4 of the Water Act (Lord's Oregon Laws, section 6595) as follows:

> "4. Nor shall anything in this act contained affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined *or pending* prior to the taking effect of this act."

It is clear from this that the act did not intend to in any way interfere with the jurisdiction of the state courts so far as pending cases were concerned, and in fact, even without such a provision it has been held that such an act in no way affects the jurisdiction of the state courts over water rights.

> *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781.

It must be equally clear that such an act was not intended to affect pending cases in the federal courts, even if the legislature had power to do so.

The attention of the court should also be called to the fact that it has been held by the United States

District Court of Oregon that proceedings under the state statute referred to are not judicial proceedings at all, but are merely administrative in their character. If that be true, then it would result that the parties to this case are entirely deprived of their right to have their rights determined by a judicial tribunal, and a judicial tribunal abdicates its function in favor of a mere administrative board which has no power to make a judicial determination in the matter.

STIPULATION.

This court in its opinion refers to the fact that the evidence was not brought up on this appeal, but adds

> "There was, however, a stipulation entered into by the respective parties that the evidence contained in the record in the suit of Pacific Live Stock Company v. W. D. Hanley, et al., No. 2036, just disposed of, be considered by the court *on the present appeal*".

The court is in error in this regard. The fact is that in the lower court a stipulation was entered into between the parties that the evidence in the Hanley case might be considered in the lower court in the present case. Assuming that that stipulation was availed of on the trial of this action, the evidence in the Hanley case would then become a part of the evidence in this case, and *in case the evidence had been brought up* that evidence could have been included in the record, but the evidence was not brought up, but the respondent, without any leave of court or any authority of law, files in

this court a stipulation that certain evidence in the Hanley case might be considered evidence in the lower court, and then asks the court to consider the evidence in the Hanley case for the purpose of overthrowing the findings in the case at bar, and the court actually uses it for that purpose, for the court says in its opinion:

> "It sufficiently appears from the evidence in the case of Pacific Live Stock Company vs. W. D. Hanley, No. 2036, just decided which *by the stipulation of the parties is added to the record herein* that in the spring time during the melting of the snows the river brings down from the mountains enormous quantities of flood waters", etc., etc.

As a matter of fact, in the lower court the court had the same evidence before it, and also had the evidence of the complainant, and from that evidence the trial court held that all of this water was not only beneficial to the complainant, but was necessary for the irrigation of its lands. In fact, we may say that in the lower court we proved the actual amount of water which flowed down the river and produced not only the government measurements, as was done in the case of the Eastern Oregon Land Company, but produced the government officials who took those measurements, and thus showed the actual amount of water which came down the river, which entirely overthrew and destroyed the testimony which is contained in the Hanley case, and to which the court refers. We also showed the actual amount of land irrigated by these waters and the actual amount of water necessary to irrigate that land, and the result was that in most years there was an absolute deficiency of water. We also showed that

the land which Hanley called "swamp" was the most valuable and productive land on the ranch and wintered thousands of head of cattle, even with three feet of snow on the ground.

We can see from the decision of the court that the court has fallen into the error of believing that the parties had entered into a stipulation that this testimony in the Hanley case might "be considered by the court *on this appeal*", or that that testimony had by stipulation of the parties been *"added to the record herein"*. Nothing could be further from the fact. The truth of it is that the lower court by its order fixed what the record on this appeal should be, and fixed it correctly, as we understand the law. The appellees took no proceedings before the lower court or before the clerk to see that the record was any different from that ordered by the trial court, and then, without any formal proceeding being taken requiring the entire record to be brought up, they produce, without any authority of law, a stipulation that certain evidence might be deemed evidence in the case in the lower court, and then on account of the fortuitous circumstance that that evidence happens to be in this court in another case, they prevail upon this court to consider it in this case, although the other evidence in the case is not before the court. In other words, they simply bring before this court, without any authority of law, one piece of evidence introduced in the lower court and by that means prevail upon this court to override the findings and judgment of the court below. Of course, if we had stipulated in this court that such a proceeding

might take place, and had stipulated that this particular evidence might be considered as part of the record on this appeal, as assumed by the court, the situation would be entirely different, but we have done nothing of the kind, and to do anything of the kind would have been absolutely absurd in view of the fact that all of the evidence introduced was for the purpose of overcoming the same claim which is attempted to be supported by the testimony of Mr. Hanley.

We have claimed right along, and still claim, that the record made up in this case was made up properly and that no amount of evidence can have anything to do with the reservation in this decree allowing the defendants a new trial of this action at any time in the future. We are either entitled to an injunction in this case or are not entitled to it, and if we were not entitled to an injunction then there was no necessity for this provision. On the other hand, if we are entitled to the injunction, the provision is absolutely unauthorized in law and unheard of in judicial proceedings, and it would only cloud this issue to bring up an immense record containing conflicting evidence upon which the court based its conclusion; but if for any reason we are wrong in this, and if the evidence can be of any avail to the court on this appeal, then the court should have ordered the evidence to be brought up, and should still do so, and when brought up and considered by the court, it will certainly fully justify the court in granting us the injunction which this court has held should have been granted in the Eastern Oregon case.

Statement of Oregon Law.

The decision of the court in this case, it also seems to us, is either very uncertain or contrary to the decisions of the Supreme Court of the State of Oregon, and of this court in regard to the rights of riparian owners in the State of Oregon. The court says in its opinion:

> "The laws of the State of Oregon in force at the time of the decree appealed from recognizing the rights of riparian proprietors to a limited extent only, and providing for the right of appropriation of water of the non-navigable streams of the state for beneficial uses, we are of opinion that the decree here in question should be reversed and the cause remanded for further proceedings in accordance with those laws."

The court then goes on to elaborately refer to the statute of Oregon providing for the appropriation of water and the determination of water rights, and without any further comment reverses the case in the manner above stated.

The rights of riparian owners have existed in Oregon ever since the admission of that state to the Union, and the extent of them has been determined by the Supreme Court of Oregon, and even this court, on the same day that this decision was rendered, rendered an opinion to the effect that the riparian owner was entitled to the entire natural and artificial benefit of a river, and could enjoin the diversion of the water therefrom. Those rights are just as much vested rights as any other right of property, and the legislature of the State of Oregon has no more power to provide for the

"appropriation" of the same than it has to provide for the "appropriation" of any other private property. Whatever those rights are, they are fixed and vested, and they are just the same before as they were after the passage of the act of 1909. In fact that act expressly provides that it shall not in any way impair any vested right, and it is well settled by innumerable cases that the mere fact that the state has provided some new tribunal or some new procedure for the determination of rights can in no way affect the jurisdiction of the federal courts to determine those rights in cases coming within the jurisdiction of the federal courts. In fact, every state we believe that has riparian rights also has a statute regulating appropriations. There is such a statute in California, for the legislature has taken notice that notwithstanding riparian rights there are many appropriations, and these statutes simply regulate the rights of appropriators as between themselves. They can not in any way affect the vested rights of riparian owners.

These are extremely important matters, and are much more far reaching even than this present case, and if the court is going to hold that the legislature of a state by simply providing for the "appropriation" of something which has been judicially determined to be held in private ownership, that should be done in a case where the matter is properly presented and argued to the court. Certainly in this case there was no necessity for such argument. The trial court recognized our riparian rights and protected them by the injunction to which we were entitled. The defendant has not attacked

the propriety of the decision of the trial court, and the only question involved in this case is the right of the court to permit the re-opening of the case at some future time. That question, therefore, and that alone, should be passed upon on this appeal.

CONCLUSION.

The limited time allowed for the preparation of petitions for rehearing has been insufficient to enable us to properly argue the important points which are raised, and, it seems to us, raised for the first time in this case by the opinion herein, but it appears to us that without further argument, and irrespective of what final determination may be made of this appeal, a rehearing should be granted herein for the following reasons:

1. The court has been misled in its assumption that it had been stipulated that the testimony of Mr. Hanley in the Hanley case could be considered on this appeal, or that it should be deemed part of the record herein, and in assuming that the same was a part of the record in the case.

2. The court has overthrown the finding supported by the evidence that all the water was necessary for the irrigation of our lands, and that we would be injured by its diversion by some loose testimony in the Hanley case which is not part of the record in this case in this court, and which the trial court held was entirely overcome by the other evidence in the case.

3. The judgment of this court is improper in that it reverses and sets at large the judgment granting an

injunction in this case, which has never been appealed from and which is therefore beyond the jurisdiction of this court to interfere with.

4. The judgment of this court is improper in that it requires parties to be brought into the case who are not necessary to a determination thereof, when the only parties who could be injured by their absence do not ask that they be brought in, nor did they file any plea to their non-joinder or appeal from the judgment against them. Moreover, there is no procedure known to the federal court by which the parties interested in the waters of this stream could be brought into the case by the complainant, and it is not to be assumed that the defendants will bring them in even if they could do so.

5. Every rule of public policy requires that there be an end to litigation, and when a matter has been tried and adjudged that adjudication should be the end of the controversy, and we believe that it is an unheard of proposition for a court to reverse a judgment not appealed from on the ground of non-joinder of parties at most only proper and not necessary where their non-joinder has in no way been relied upon by the adverse party.

We respectfully submit that the rehearing should be granted in order that these matters may be properly presented to the court.

Respectfully submitted,

Edward F. Treadwell,

Wirt Minor,

Solicitors for Appellant and Petitioner.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded, and that it is not interposed for delay.

EDWARD F. TREADWELL,
Solicitor for Appellant and Petitioner.

No. 2031

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

AUGUST E. MUENTER, as Collector of Internal Revenue of the United States for the First Collection District of California,

Plaintiff in Error,

vs.

THE UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee, Under the Trust Declared by the Last Will of JOHN J. VALENTINE, and EDWARD C. VALENTINE, ETHEL STEIN VALENTINE, J. J. VALENTINE, Jr., WILLIAM GEORGE VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE and PHILIP C. VALENTINE,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Room 317 U. S. P. O. & Courthouse Bldg., San Francisco, California.

MARSHALL B. WOODWORTH and EDWARD LANDE, Esqs., Attorneys for Plaintiffs and Defendants in Error,

519 California St., San Francisco, California.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee Under the Trust Declared by the Last Will of JOHN J. VALENTINE, and EDWARD C. VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE, PHILIP C. VALENTINE, and J. J. VALENTINE, Jr., ETHEL STEIN VALENTINE and WILLIAM GEORGE VALENTINE,

Plaintiffs,

vs.

JOHN C. LYNCH, Collector of Internal Revenue for the First District of California,

Defendant.

Complaint.

Now, come the plaintiffs above named, and file this

their complaint against the defendant, and for cause of action allege:

I.

That at all the times herein mentioned, the plaintiff, Union Trust Company of San Francisco, was and now is a corporation, organized and existing under the laws of the State of California, with its principal place of business in the City and County of San Francisco.

That at all the times herein mentioned, the Union Trust Company of San Francisco was, and now is, the trustee under the trust declared by the Last Will and Testament of John J. Valentine, deceased, as hereinafter more particularly appears.

That at all the times hereinafter mentioned, the said plaintiffs, Edward C. Valentine, William George Valentine, Ethel Stein Valentine, Dudley B. Valentine, Eliza R. Valentine, Philip C. Valentine and J. J. Valentine, Jr., were, and now are, the [1*] beneficiaries, under the trust declared by the said Last Will and Testament of John J. Valentine, deceased.

That at all the times herein mentioned, the defendant, John C. Lynch, was, and now is, the Collector of Internal Revenue for the First District of California.

II.

That one John J. Valentine died in the County of Alameda, State of California, on or about the 21st day of December, 1901, being a resident thereof at the time of his death, and leaving property therein, and leaving a Last Will and Testament, a copy of

*Page number appearing at foot of page of original certified Record.

which is hereto attached, and marked Exhibit "1," and made a part hereof; that proceedings were had and taken, in accordance with the laws of the State of California, for the probate of said Last Will and Testament, in the Superior Court of the State of California, for the County of Alameda, which proceedings were, and are, numbered 17723, and entitled, "In the Matter of the Estate of JOHN J. VALENTINE, deceased"; and that in said proceedings, on or about December 30, 1901, after the filing of the Last Will and Testament of the said decedent, the said Superior Court duly gave and made an order admitting said Last Will and Testament to probate, and appointed said Union Trust Company of San Francisco executor thereof, who thereafter duly qualified and continued to act as executor, until the close of the administration of said estate.

III.

That after proceedings regularly had and taken in said probate proceedings, by an order of said Superior Court, duly given and made on the 11th day of March, 1903, the property of said estate was, by decree of distribution, distributed to Union Trust Company of San Francisco, as trustee under the trust declared by said Last Will and Testament, and included in said [2] property so distributed in trust to said Union Trust Company of San Francisco, as aforesaid, was personal property, to be held in trust for the following named beneficiaries, of the value set opposite their respective names, viz.:

To Edward C. Valentine, personal property of the value of $17,502.91
William George Valentine..... 17,502.91
Ethel Stein Valentine..... 31,416.89
Dudley B. Valentine..... ..... 21,761.40
Eliza R. Valentine..... 35,676.41
Philip C. Valentine..... ..... 31,038.41
J. J. Valentine, Jr..... 17,502.91

Said personal property to be held, and is now being held, in trust, by said Union Trust Company of San Francisco, as such trustee, and the income thereon paid by said Union Trust Company of San Francisco to the said beneficiaries, until the youngest of said children (said Philip C. Valentine) shall have attained his majority (a copy of which said decree is hereto attached, marked Exhibit 2 and made a part hereof).

IV.

That Philip C. Valentine is the youngest of said children and will reach his majority on the 7th day of May, 1920, and not before.

That none of the said children and beneficiaries, hereinabove mentioned, have any vested interest whatsoever in any portion of said estate, save and except the income thereon.

That said income in each instance is of so small amount that the annuity value thereof, under the rules of the Internal Revenue Department, for the purpose of assessing taxes on legacies, is much less than $10,000.00 and is, in fact, in the neighborhood of $1,000.00. [3]

V.

That on the 16th day of May, 1903, the Collector of Internal Revenue for the First District of California, assuming and pretending to act under and by virtue of the provisions of the Act of Congress of June 13th, 1898, as amended by the Act of Congress of March 2d, 1901, and the rules and regulations in such cases made and provided, assessed the Union Trust Company of San Francisco an Internal Revenue Tax, aggregating the sum of $1661.00, said tax being assessed upon the legacies distributed to said Union Trust Company of San Francisco, in trust, as above stated, for the said beneficiaries as follows:

To the legacy of $17,502.91 in favor of Edward C. Valentine a legacy tax of $131.27; to the legacy of $17,502.91 in favor of William George Valentine a legacy tax of $131.27; to the legacy of $31,516.89 in favor of Ethel Stein Valentine the legacy tax of $353.44; to the legacy of $21,761.40 in favor of Dudley B. Valentine a legacy tax of $163.21; to the legacy of $35,676.41 in favor of Eliza R. Valentine a legacy tax of $401.36; to the legacy of $31,038.41 in favor of Philip C. Valentine a legacy tax of $349.18; to the legacy of $17,502.91 in favor of J. J. Valentine, Jr., the legacy tax of $131.27; said legacy taxes aggregating the sum total, as above stated, of $1661.00. (Reference is hereby made to the Assessment-book, of record in the office of the Collector of Internal Revenue for the First District of California.)

That previous to said assessment by said Collector of Internal Revenue, as aforesaid, and acting in compliance with the authority and instructions assumed

or pretended to be exercised by said Collector of Internal Revenue, said Union Trust Company of San Francisco, did, on the 29th day of April, 1903, file with the defendant, John C. Lynch, as Collector of Internal [4] Revenue, a notice in duplicate upon form No. 490, prescribed by the laws and regulations in and for the United States Internal Revenue Department (a copy of which said notice is herewith attached, marked Exhibit 3 and made a part hereof).

That thereafter, on April 30th, 1903, and previous to the assessment of said Internal Revenue Tax of $1661.00 by said Collector of Internal Revenue, as aforesaid, and in compliance with the authority and instructions assumed or pretended to be exercised by said Collector of Internal Revenue, said Union Trust Company of San Francisco filed with the defendant, as Collector of Internal Revenue, on form No. 419 (approved December, 1901), Legacy Return, amended to conform to the instructions of said Collector of Internal Revenue and the officials of the Internal Revenue Department (a copy of which said Legacy Return as amended is hereunto attached, marked Exhibit No. 4 and made a part hereof), and also at the same time and under the same circumstances, as hereinbefore set forth, filed with said defendant, as Collector of Internal Revenue, on form No. 494, prescribed January 29th, 1902, supplemental to, and made a part of form 419, a Schedule of Stocks, bonds, notes, and other securities, and other personal property (a copy of which Schedule is hereto attached, marked Exhibit No. 5 and made a part hereof).

That before the said Collector of Internal Revenue or any of the officials of the Internal Revenue Department would accept said Legacy Return, the Union Trust Company of San Francisco was compelled by said defendant to amend its Legacy Return, as above stated, so as to read as per copy hereto attached, hereinabove referred to, and marked Exhibit No. 4, to which amended portion reference is herewith specifically made, and did so make and file said amended return, on April 30th, 1903, under [5] protest with the said defendant, said protest being set forth in said Amended Return.

That on May 22d, 1903, said defendant, as Collector of Internal Revenue for the First District of California, notified said Union Trust Company of San Francisco, in Form No. 455, that a tax, under the Internal Revenue Laws of the United States, amounting to $1661.00, the same being a tax upon Legacies and Distributive Shares, had been assessed against said Union Trust Company of San Francisco, by the Commissioner of Internal Revenue, and transmitted to said defendant, as Collector of Internal Revenue for the First District of California, for collection, and demanded the payment of said tax of $1661.00 (a copy of which notice is hereunto annexed and made a part hereof, and marked Exhibit No. 6).

That the originals of said Notice, Legacy Return as Amended, Schedule, and Notice of and Demand for Legacy Taxes assessed, with papers thereunto attached, are now on file in the office of the Collector of Internal Revenue, for the First District of California, and are hereby referred to.

VI.

That thereafter and on May 27th, 1903, the Union Trust Company of San Francisco, so assessed as aforesaid by the said defendant, Collector of Internal Revenue for the First District of California, paid to the said defendant, as Collector of Internal Revenue for the First District of California, the sum of $1661.00, and received duplicate receipts therefor (a copy of one of which is hereunto annexed and made a part hereof, and marked Exhibit No. 7), which said sum of $1661.00 was paid by the said Union Trust Company of San Francisco to the defendant as Collector of Internal Revenue for the First District of [6] California, for and on behalf of the beneficiaries above named, and which said sum of $1661.00 was paid under protest as aforesaid (a copy of which protest is hereunto annexed and made a part hereof, and marked Exhibit No. 8).

VII.

That said assessment of said tax of $1661.00, or any portion thereof, was not required by law, and was, and is, illegal and erroneous, and without authority of law, and that said payment of said sum of $1661.00 was made by said Union Trust Company of San Francisco, under protest as aforesaid, and was, and is, illegal, and erroneous, and without authority of law, and said sum of $1661.00 should be refunded and repaid to said Union Trust Company of San Francisco for and on behalf of the beneficiaries above named.

VIII.

That all of the taxes, which have been collected by

the defendant, were collected upon the contingent interests of Edward C. Valentine, William George Valentine, Ethel Stein Valentine, Dudley B. Valentine, Eliza R. Valentine, Philip C. Valentine and J. J. Valentine, Jr., none of which interests had become vested prior to July 1, 1902, and none of which interests have, since said decree of distribution or since the death of John J. Valentine, as aforesaid, become vested, and none of which interests have at any time become vested in possession or enjoyment; that under the provisions of an Act of Congress of June 27, 1902, the Commissioner of Internal Revenue, upon proper application being made to him, is compelled to refund all of said taxes.

IX.

That heretofore and before the commencement of the present [7] suit, to wit, on the 13th day of June, 1903, said Union Trust Company of San Francisco presented to, and filed with, said John C. Lynch, as Collector of Internal Revenue, as aforesaid, a claim on blank form No. 46, revised April, 1901, of the United States Internal Revenue Department, under Series 7, Number 14, Revised, and series 7, No. 27, Supplement No. 1, for taxes improperly paid, or refundable under remedial statutes, etc., claiming that it was entitled to the refunding of the sum of $1661.00 for taxes illegally and unlawfully and without authority of law assessed and collected from, and paid by it, said Union Trust Company of San Francisco, on behalf of the beneficiaries above named, and claiming further that said sum of $1661.00 had been paid in contingent interests which had not yet vested

and which should be refunded for the reasons set forth in the said claim, which are therein and herein set forth, a copy of which said claim is on file in the office of the Collector of Internal Revenue, First District of California, reference to which is hereby made, and which is made a part hereof, and a copy of the same is hereto attached and made a part hereof and marked Exhibit No. 9.

X.

That said claim for refunding taxes collected was filed, as above stated, on the 13th day of June, 1903, and that said claim was thereafter, on the 22d day of June, 1903, forwarded by said defendant John C. Lynch, as Collector of Internal Revenue, to the Commissioner of Internal Revenue, for the decision of said Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Treasury established in pursuance thereof, but that said Commissioner of Internal Revenue had not, up to the filing of [8] this complaint, and has not since, decided or acted upon said claim, and said claim has neither been allowed nor disallowed by said Commissioner of Internal Revenue, and that more than six months from the date of the said appeal have now elapsed without a decision on said claim by said Commissioner of Internal Revenue, and that, according to the provisions of sections 3226 and 3227 of the Revised Statutes of the United States, said plaintiffs are entitled to bring this suit.

XI.

That said Acts of Congress of June 13th, 1898, and

March 2d, 1901, under which the said defendant, John C. Lynch, as Collector of Internal Revenue for the First District of California, assumed and pretended to act in assessing and collecting from the Union Trust Company of San Francisco said tax of $1661.00, in the manner and form above set forth, have been repealed by the Act of Congress of April 12th, 1902, and that said repeal of said Act of Congress took effect July 1, 1902; that, in view of said repeal of said Acts of Congress and of the further fact that said John J. Valentine died on December 21, 1901, no legacy Internal Revenue Tax could be lawfully assessed and collected from the estate of John J. Valentine, deceased, or from the Union Trust Company of San Francisco, as executor or as trustee of the estate of John J. Valentine, deceased, or from the legatees or beneficiaries of said estate, for the reason that said legacy Internal Revenue Tax was, in any event, not due or payable, if due or payable at all, for one year after the death of the said testator, John J. Valentine, and the said John J. Valentine having died on December 21, 1901, at which time and long previous thereto, to wit, on July 1, 1902, said repeal of said Acts of Congress of June 13, 1898, and March [9] 2, 1901, became effective, no legacy Internal Revenue Tax was due or payable on May 16, 1903, at which time said defendant, as Collector of Internal Revenue, assessed, as above set forth, a legacy Internal Revenue Tax of $1661, and, on May 27, 1903, collected said sum of $1661.00 from said Union Trust Company of San Francisco as above set forth.

XII.

That said Commissioner of Internal Revenue and defendant have refused and still refuse to refund said sum of $1661.00, or any part thereof, and that the whole and every part thereof is still due and unpaid.

Wherefore, plaintiffs pray for judgment against said defendant for the sum of $1661.00, together with interest at the rate of seven per cent per annum, and costs.

HELLER & POWERS,
Attorneys for Plaintiff.

MARSHALL B. WOODWORTH,
Of Counsel.

State of California,
City and County of San Francisco,—ss.

I, W. Hellman, Jr., being duly sworn, deposes and says: That he is an officer, to wit, the Vice-president and Manager of the Union Trust Company of San Francisco (a corporation), one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those [10] matters that he believes it to be true.

I. W. HELLMAN, Jr.

Subscribed and sworn to before me this 19th day of May, 1905.

[Seal] D. B. RICHARDS,
Notary Public in and for the City and County of San Francisco, State of California. [11]

Exhibit No. 1.

IN THE NAME OF GOD AND OF OUR LORD JESUS CHRIST, AMEN.

I, JOHN J. VALENTINE, a resident of the City of Oakland, County of Alameda, State of California, being of sound mind and disposing memory, and appreciating the uncertainties of life do make and publish this my last will and testament;

After all my just debts shall have been paid from available cash assets, or from the conversion into cash of as much of the other holdings as may be requisite, I give and bequeath as follows:—

FIRST: To my sister Samantha I. Valentine, the sum of three thousand dollars ($3,000.00);

SECOND: To my niece Frances V. Norvell the sum of three thousand dollars ($3,000.00);

From these bequests to my near kindred I omit my married sisters Mary Emily Campbell, Susan Sarah Josephine Norvell, not through any oversight or want of brotherly affection and solicitude for them, but because I have reason to think, as they will understand, that they have been and are provided for; and my brother James Thurman Valentine is omitted in the same way, because I consider him capable of providing for himself.

THIRD: To my beloved wife, Alice M. B. Valentine, I give and bequeath the sum of sixty-five thousand dollars ($65,000.00) and, in addition thereto, I give and devise to her the family homestead in East Oakland, California, known as "Cedar Croft" including all the real and personal property and house-

hold effects connected therewith or in anywise appertaining thereto, the same being valued, together at Forty-five thousand dollars ($45,000.00).

FOURTH: All the residue of my estate, including life insurance, I wish to have cared for and handed to the best advantage and proceeds apportioned to my seven children as follows: Edward Cahill, twenty-five thousand dollars ($25,000.00); Ethel Stein, forty thousand dollars ($40,000.00) John Joseph Jr. twenty-five thousand dollars ($25,000.00); William George twenty-five thousand dollars ($25,000.00); Dudley Blanchard twenty-five thousand dollars ($25,000.00) Eliza Ruth forty thousand dollars ($40,000.00) Philip Crenshaw thirty-five thousand dollars ($35,000.00) or in those proportions to as many of them as may survive me; upon the express condition, however, that the sum total of bequests to the seven children named or such of them as may survive me, be, and shall be held in trust by the Union Trust Company of San Francisco until the youngest shall have attained his or her majority; provided, further, that Edward Cahill, Ethel Stein, John Joseph Jr. and William George, to whom the proceeds of three insurance policies made payable to their mother Mary F. Valentine and aggregating twenty seven thousand dollars ($27,000.00) revert in equal shares by reason of her decease, do allow the said shares to become a part of the trust fund; and that if they or any of them decline to do so, then the proportionate amount coming to each one of them that so declines (from the said three insurance policies) shall be deducted from the amount above set

down as his or her allotted proportion of the trust fund, and shall to that extent diminish his or her proportionate interest in the remainder of said trust funds. Income from the whole to be paid quarterly or semi-annually to each beneficiary in the proportion indicated in the above allot*t*ment and proviso. [12]

If any of the said children should die unmarried the proportionate bequest due the same shall revert to the remaining beneficiaries under this clause.

FIFTH: In case of my death by accident, the bequest to my wife, Alice M. B. Valentine, will be increased by the sum of twenty thousand dollars ($20,000.00) from proceeds of accident insurance; the remainder of proceeds from such source to be divided among my seven children in the proportions stated in Clause Fourth with its proviso;

SIXTH: I hereby nominate and appoint the UNION TRUST COMPANY OF SAN FRANCISCO, of the City and County of San Francisco, State of California, the Executor of this my last will and testatment, and repeat my injunction that the bequests to my children be held in trust until the youngest shall attain his or her majority.

Pending the administration of my estate I authorize and empower my said Executor at its discretion, and without control or supervision of any court of law, to sell and dispose of any and all of said estate, except that which will be subject to my wife's direction under clause Third hereof whether real or personal, and to make valid transfers and conveyances thereof.

LASTLY: I hereby revoke any and all wills and testaments by me heretofore made.

IN WITNESS WHEREOF, I have caused the foregoing to be written, marked the first two pages with my name, and do hereunto set my hand and seal at the City of Oakland, County of Alameda, State of California, the twenty fourth day of August A. D. Nineteen hundred and One (1901)

(Signed) JNO. J. VALENTINE. [Seal]

The foregoing instrument consisting of two pages besides this, was, at the date thereof by the said John J. Valentine signed and sealed and published as and declared to be his last will and testament in the presence of us, who, at his request and in his presence, and in the presence of each other subscribed our names as witnesses thereto.

(Signed) NATHAN STEIN,

Residing at 1045 Santa Clara Avenue, Alameda, Cal.

C. H. GARDINER,

Residing at 1370 Nineteenth Avenue, East Oakland, Cal. [13]

Exhibit No. 2.

In the Superior Court of the County of Alameda, State of California.

In the Matter of the Estate of JOHN J. VALENTINE, Deceased.

Decree of Final Distribution and Settling Final Account.

The petition of Union Trust Company of San Francisco, executor of the Last Will and Testament of John J. Valentine, deceased, heretofore filed

herein praying for the final distribution of the residue of the estate of John J. Valentine, deceased, and the final account of said Union Trust Company of San Francisco, heretofore filed herein, together with a petition for the allowance of the same, and the petition of Alice M. B. Valentine, widow of John J. Valentine, deceased, heretofore filed herein, praying for the distribution of the residue of the estate of said John J. Valentine, deceased, coming on this day regularly for hearing, and the executor, said Union Trust Company of San Francisco, being represented by its counsel, E. S. Heller, Esq., and the said Alice M. B. Valentine being represented by her counsel, Warren Olney, Esq., and the minor children of said John J. Valentine, deceased, to wit: William George Valentine, Dudley Blanchard Valentine, Eliza Ruth Valentine, and Philip Crenshaw Valentine, being represented by their counsel, Charles E. Snook, Esq.;

And it appearing that due and legal notice of the hearing [14] of said petitions and account has been given as directed by the order of this Court heretofore made, and as required by law;

And after taking testimony in the matter, and the Court being fully advised does now find, adjudge and decree;

I.

That John J. Valentine, deceased, died testate on the 21st day of December, 1901, in the County of Alameda, State of California; that at the time of his death he was a resident of said County, and left estate therein and elsewhere consisting of real and personal property.

II.

That on December 30, 1901, the Last Will and Testament of said deceased was filed in the office of the County Clerk of said County, together with a petition for the probate of the same, and that on January 17, 1902, by an order of this Court duly given and made, said Last Will and Testament of said deceased was admitted to probate, and by the same order the Union Trust Company of San Francisco was appointed executor thereof; that on the day last named said Union Trust Company of San Francisco duly qualified as such executor and Letters Testamentary were issued to it, and a duplicate thereof filed in the office of said Clerk, and said Union Trust Company of San Francisco has ever since been and now is, the duly appointed, qualified and acting executor of the Last Will and Testament of said deceased.

III.

That under and by virtue of an order of this Court duly given and made, dated January 17, 1902, said executor caused to be published in a newspaper published in said County of [15] Alameda, to wit, in the "Oakland Enquirer," a notice to the creditors of said decedent, requiring all persons having claims against said estate to exhibit them with the necessary vouchers to said executor at its place of business, which was specified in said notice; that the time expressed in said notice for the presentation of claims was ten months after its first publication; that upon due proof of the publication of the same to the satisfaction of this Court, a decree and order was, on December 16, 1902, duly given and made adjudging

that due notice to the creditors of said deceased had been given.

IV.

That a claim of the Mountain View Cemetery Association for the sum of $1820.50 against said estate, has not been paid, and after taking testimony concerning same, the Court now adjudges that the executor pay the same.

V.

That on April 3, 1902, the widow of said deceased, Alice M. B. Valentine, filed herein a petition for family allowance, and that on April 3, 1902, by an order of this Court duly given and made, said petition for family allowance was granted; and on October 24, 1902, upon the petition of said Alice M. B. Valentine for the continuance of said family allowance, an order was duly given and made continuing the payment of the same.

VI.

That on August 13, 1902, said executor duly made and returned to this Court and filed with the Clerk thereof, a true inventory and appraisement of all the property and estate of said deceased which had come into its possession or knowledge; that no property belonging to said estate other than that mentioned in the said inventory, saving the rents, issues and profits [16] thereof as shown by the account heretofore rendered and filed and settled, and as shown by the final account hereinabove mentioned, has come to the possession or knowledge of said executor.

VII.

That all the debts and accounts due to the said de-

cedent which were collectible have been collected, and no debts due the said estate remain uncollected through any fault or negligence on the part of said executor.

VIII.

That said final account contains a full, true and correct account of all the receipts of said executor to the date thereof, and also a full, true and correct statement of all moneys disbursed by said executor to the date thereof, and the Court being fully advised does hereby order, adjudge, and decree that said final account be and the same is hereby settled, approved and allowed.

IX.

That upon the hearing this day and upon the petitions above mentioned, said executor did file herein a supplemental account showing receipts and disbursements subsequent to the filing of the final account herein, and the Court being fully advised does hereby order, adjudge and decree that the said supplemental account be and the same is hereby settled, approved and allowed.

X.

That the claim of Wells-Fargo & Co. for the sum of $101,031.54 was allowed by the executor and the Court, and filed herein on January 3, 1903; that since the filing of the petitions for final distribution herein said Wells-Fargo & Co. sold 475 shares of the capital stock of Wells-Fargo & Co. [17] held by it as security, as appears in said claim, to wit: Certificates numbers 19,340 for one hundred shares, 19,341 for one hundred shares, 19,342 for one hundred shares,

19,344 for one hundred shares, and seventy-five shares out of ninety shares represented by certificate number 19,343, and realized upon said sale the sum of $104,914.63, leaving a balance of 325 shares of the capital stock of Wells-Fargo & Co. represented by certificates numbers 19,058 for ten shares, 19,345 for one hundred shares, 19,346 for one hundred shares, 19,347 for one hundred shares, and ——— for fifteen shares, belonging to said estate; that after making said sale as aforesaid said Wells-Fargo & Co. did, on March 7, 1903, reimburse itself for the amount of its said claim amounting at the time of such reimbursement to the sum of $102,630.98 and did pay to said executor the balance of said purchase price amounting to the sum of $2,283.65, and the payment of the said claim of Wells-Fargo & Co. and the sale of said stock by Wells-Fargo & Co. *and the sale of said stock by Wells-Fargo & Co.* as aforesaid, are hereby sanctioned and approved, and the Court adjudges that said claim of Wells-Fargo & Co. is fully paid; that the receipt of said balance of $2,283.65 by the executor herein is shown by the second supplemental account filed herein subsequent to the supplemental account above mentioned, and said second supplemental account is hereby approved and allowed.

XI.

That more than ten months have elapsed since the first publication of said notice to creditors; that all the debts of said deceased, all funeral expenses, expenses of last illness, expenses of administration and management of said estate to the date hereof, except counsel fees for the attorneys of said executor [18] for legal services performed in conducting the vari-

ous and necessary proceedings herein, and counsel fees for the attorney for the minor heirs, have been paid.

XII.

That all taxes legally assessed or levied upon the property of said estate and due up to the date hereof against the said estate and property thereof, have been paid, saving and excepting, however, the following:

(a) That at noon on the first Monday in March, to wit: March 2d, 1903, there became due to the State of California, the County of Alameda, and the City of Oakland, upon the property of said estate subject and liable to taxation, the taxes for the fiscal year next ensuing, but that the rate thereof has not as yet been fixed or determined;

(b) The collateral inheritance tax due the State of California upon the legacy to the sister of said deceased, Samantha I. Valentine, which legacy amounts to $3,000.00, and which inheritance tax is hereby fixed at the sum of $150.00;

(c) The collateral inheritance tax due the State of California upon the legacy to the niece of said deceased, Frances V. Norvell, which legacy amounts to the sum of $3,000.00, and which inheritance tax is hereby fixed at the sum of $150.00;

(d) The legacy taxes due to the United States of America under an Act of Congress dated June 13, 1898, upon the amount of personal property bequeathed to the trustee hereinafter named for the benefit of the children of said deceased, in accordance with Clause Fourth of the Last Will and Testament

of said deceased; such legacy taxes are estimated as follows: Upon the share of Edward Cahill Valentine the sum of $ 00.00; upon the share of Ethel Stein Valentine the sum of $239.47; upon the share of John Joseph Valentine, Jr., the [19] sum of $ 00.00; upon the share of William George Valentine the sum of $ 00.00; upon the share of Dudley Blanchard Valentine the sum of $165.62; upon the share of Eliza Ruth Valentine the sum of $271.41; upon the share of Philip Crenshaw Valentine, the sum of $236.15; that it is a matter of doubt whether or not said legacy taxes under the Act of Congress of June 13, 1898, are collectible or payable against the interests of the beneficiaries herein named by reason of the provisions of an Act of Congress dated June 27, 1902, and there is hereby distributed unto the Union Trust Company of San Francisco, as trustee, the sums of money estimated to be due on account of the legacies herein mentioned for the benefit of each of the above named seven children of said John L. Valentine, deceased, and beneficiaries under his said Last Will and Testament, in trust to hold said sums for payment to the United States of America of the legacy tax upon the several interests of said children and beneficiaries in the event that payment thereof is required by the United States of America; and if payment thereof is not required by the United States of America, or if payment thereof is avoided, then the total of said sums shall be distributed to said Union Trust Company of San Francisco, residuary legatees and devisee, in the manner hereinafter provided for the distribution of the residue of said es-

tate, as shown by paragraph "(d)" of clause XX of this decree of final distribution.

XIII.

That the sum of $3,250 is hereby fixed as reasonable counsel fees to be allowed to the executor for payment to Heller & Powers, its attorneys, and the sum of $500 is hereby fixed as reasonable counsel fees to be paid to the attorney for minor heirs, and the Court directs the executor to pay the same. [20]

XIV.

That the balance of cash in the hands of said executor after making the deduction for payment of the claim of Mountain View Cemetery Association, and the payment to said executor on account of attorneys' fees allowed, and upon payment of the fee of the attorney for minor heirs, is the sum of $5,123.71.

XV.

That the personal property particularly described in "Schedule A" annexed to this decree and made part hereof is in the possession of said executor and belongs to said estate, and the real property as shown in "Schedule B" annexed hereto and made a part hereof, belongs to and is a part of the estate of said decedent.

XVI.

That on February 16, 1903, by an order duly given and made herein, Charles E. Snook, Esq., was appointed attorney for all the minor children of the said John J. Valentine, deceased, to wit: for William George Valentine, Dudley Blanchard Valentine, Eliza Ruth Valentine, and Philip Crenshaw Valentine, to represent them in all matters herein.

XVII.

That the heirs at law of said John J. Valentine, deceased, at the time of his death, were, his widow, Alice M. B. Valentine, and seven children, to wit: Edward Cahill Valentine, Ethel Stein Valentine, John Joseph Valentine, Jr., William George Valentine, Dudley Blanchard Valentine, Eliza Ruth Valentine, Philip Crenshaw Valentine, all of whom are now living.

XVIII.

That in the petition for final distribution filed herein by the said Alice M. B. Valentine, it is therein claimed that [21] all the shares of stock of Wells, Fargo & Co. owned by said decedent at the time of his death, and all the shares of stock of the Pacific States Telephone and Telegraph Company owned by said decedent at the time of his death, were and are community property of said decedent and Alice M. B. Valentine, and that the rest and residue of the property owned by said decedent at the time of his death, was his separate property; that said Alice M. B. Valentine is willing to waive her right to all the specific legacies and devises made to her in the Last Will and Testament of said deceased, and is further willing to waive her right to one-half of the community property of the said deceased and herself, and is further willing to waive her statutory right to a homestead out of the property of said deceased, and is further willing to waive her statutory right to the household furniture and effects of said deceased, and is further willing to waive her right to all moneys accruing out of any life insurance on the life of said

deceased the annual premiums of which do not exceed five hundred dollars, provided there is distributed to her by consent and agreement of all parties in interest herein, an undivided one-third of all of the property of said John J. Valentine, deceased, including the separate and community property of his said estate, after payment of the respective legacies to Samantha I. Valentine and Frances V. Norvell hereinbefore mentioned, and after payment of the expenses of administration, the debts of deceased, and the costs and expenses shown by the accounts of the executor on file herein;

That after a full hearing of said petition and of the issues presented thereby, and after considering the testimony and evidence offered in support thereof the Court adjudges [22] and finds that all the allegations of fact therein set forth are true, and all parties interested in said estate, to wit: Union Trust Company of San Francisco, as residuary legatee and devisee under the Last Will and Testament of said decedent, and Charles E. Snook, Esq., attorney for the above-named minor children of said John J. Valentine, deceased, both consenting thereto, and Edward Cahill Valentine, Ethel Stein Valentine, and John Joseph Valentine, Jr., children of said deceased and beneficiaries under his last Will and Testament not objecting but consenting thereto, the Court does adjudge and decree that all interested parties herein have consented to the distribution to the said Alice M. B. Valentine of one-third of all the separate and community property owned by the said John J.Valentine at the time of his death, less the

deductions above mentioned concerning the payment of the legacies, expenses of administration, debts of deceased, and costs and expenses shown by the accounts of the executor.

XIX.

That at the time of the death of said John J. Valentine, deceased, he was the owner of a policy of life insurance number 143,373 in the Mutual Life Insurance Company of New York for the sum of Fifteen Thousand Dollars, and which was payable to Mary F. Valentine, the former wife of said deceased, and upon her death to her four children, viz.: Edward Cahill Valentine, Ethel Stein Valentine, John Joseph Valentine, Jr., and William George Valentine; that the said policy was paid after his death, and each of said four last-named children received the sum of $3,758.50 on account thereof;

That at the time of the death of said John A. Valentine, deceased, he was the owner of a policy of life insurance numbered [23] 86,139 in the New York Life Insurance Company for the sum of Ten Thousand Dollars, and which was payable to Mary F. Valentine, the former wife of said deceased, and upon her death to the children of John J. Valentine; that the said policy was paid after his death, and that each of the seven children of the said John J. Valentine, deceased, received the sum of $1,428.57 on account thereof;

That at the time of the death of said John J. Valentine, he was the owner of a policy of life insurance numbered 1965 in the Expressman's Mutual Life Insurance Association, for the sum of Two Thousand

Dollars, and which was payable to Mary F. Valentine, the former wife of said deceased, and upon her death to the four children of the said Mary F. Valentine, to wit: Edward Cahill Valentine, Ethel Stein Valentine, John Joseph Valentine, Jr., and William George Valentine; that the said policy was paid after his death and each of the said four last-named children received the sum of $500.00 on account thereof;

That the said Mary F. Valentine was at one time the wife of said deceased, and died on or about the 7th day of September, 1885, leaving surviving her four children of the said John J. Valentine, to wit, said Edward Cahill Valentine, Ethel Stein Valentine, John Joseph Valentine, Jr., and William George Valentine, being four of the children herein mentioned;

That at the time the proceeds of said three policies of life insurance were paid to the children above named of the said decedent, John J. Valentine, each and all of said children saving and excepting Edward Cahill Valentine and Ethel Stein Valentine, were minors, and the sums received by the said minors were paid to Alice M. B. Valentine, as guardian of [24] their persons and property, for and in their behalf; that neither the children of said decedent, nor Alice M. B. Valentine as guardian of the persons and property of any of said minor children, have allowed the said sums so paid as aforesaid on account of moneys received from said policies of life insurance to become a part of the residue of said estate, or part of the trust funds as defined in clause Fourth

of said Last Will and Testament, and that, on account thereof, the proportionate amounts coming to each of said children must be deducted from the amount set down in said Last Will and Testament of said deceased or his or her allotted portion of the property to be held in trust by the trustee, and must, to that extent diminish his or her proportionate interest in the remainder of said trust funds, and that by reason of said payments proper allowances, deductions and additions must be made as against the shares of the residuary beneficiaries, and which allowances, deductions and additions are hereinafter particularly set forth and determined.

XX.

It is hereby ordered, adjudged and decreed that there be distributed

(a) Unto Samantha I. Valentine, sister of said deceased, the sum of Three Thousand Dollars, less five per cent thereof for collateral inheritance tax due the State of California;

(b) Unto Frances V. Norvell, niece of said deceased, the sum of Three Thousand Dollars, less five per cent thereof for collateral inheritance tax due the State of California;

(c) Unto Alice M. B. Valentine, widow of said deceased, after payment of the foregoing legacies and subject to the payment of all taxes levied or to be levied by, due or to become [25] due to, assessed or to be assessed by the City of Oakland, or the County of Alameda, or the State of California, one-third of all the property now in the possession and control of the executor herein, including one-third of

the cash on hand, one-third of the personal property shown in "Schedule A" hereto attached, and an undivided one-third of the real property shown in "Schedule B" hereto attached, and an undivided one-third of all other property of said deceased not now known or discovered and which may hereafter become known or discovered, or which may herein be imperfectly described, with the right, however, in the executor herein, to withhold sufficient moneys to pay the taxes levied or to be levied by, due or to become due to, assessed or to be assessed by the City of Oakland, or the County of Alameda, or the State of California, out of the share so distributed, or, in its discretion, to require security from the said Alice M. B. Valentine for the payment thereof, after the payment of the legacies to Samantha I. Valentine and Frances V. Norvell;

(d) All the rest and residue of the property now in the possession or under the control of the executor aforesaid, and all other property of said deceased not now known or discovered and which may hereafter become known or discovered, or which may be herein on hand, two-thirds of the personal property shown imperfectly described including two-thirds of the cash in "Schedule A" hereto attached, and an undivided two-thirds of the real property shown in "Schedule B" hereto attached, is, subject to the payment of all taxes levied or to be levied by, due or to become due to, assessed or to be assessed by the City of Oakland, or the County of Alameda, or the State of California, and subject to the payment to the United States of America of the legacy tax due from the share of each

of the beneficiaries [26] hereinafter named under the Act of Congress of June 13, 1898, distributed to the Union Trust Company of San Francisco in trust for the benefit of the following named beneficiaries in the proportions herein named, as follows: For the benefit of Edward Cahill Valentine, 25/215ths thereof less the sum of $2,543.82 (deduction by reason of receipt of proceeds of life insurance policies as aforesaid), and less the sum of $00.00, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which may become due to the United States of America under the Act of Congress of June 13, 1898); for the benefit of Ethel Stein Valentine, 40/215ths thereof less the sum of $657.87 (deduction by reason of receipt of proceeds of life insurance policies as aforesaid), and less the sum of $239.47, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which may become due to the United States of America under the Act of Congress of June 13, 1898); for the benefit of John Joseph Valentine, Jr., 25/215ths thereof less the sum of $2,543.82 (deduction by reason of receipt of proceeds of life insurance policies as aforesaid), and less the sum of $00.00, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which may become due to the United States of America under the Act of Congress of June 13, 1898); for the benefit of William George Valentine, 25/215ths thereof less the

sum of $2,543.82 (deduction by reason of receipt of proceeds of life insurance policies as aforesaid), and less the sum of $00.00, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which [27] may become due to the United States of America under the Act of Congress of June 13, 1898); for the benefit of Dudley Blanchard Valentine 25/215ths thereof *plus* the sum of $1,714.68 (addition made by reason of receipt of proceeds of life insurance policies as aforesaid), and less the sum of $165.62, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which may become due to the United States of America under the Act of Congress of June 13, 1898); for the benefit of Eliza Ruth Valentine, 40/215ths thereof *plus* the sum of $3,601.65 (addition made by reason of receipt of proceeds of life insurance policies as aforesaid), and less the sum of $271.41, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which may become due to the United States of America under the Act of Congress of June 13, 1898); for the benefit of Philip Crenshaw Valentine, 35/215th thereof *plus* the sum of $2,973.00 (addition made by reason of receipt of proceeds of life insurance policies as aforesaid); and less the sum of $236.-15, or such other sum as may be paid by said trustee on account of legacy tax due the United States of America (deduction on account of legacy tax which

may become due to the United States of America under the act of Congress of June 13, 1898); and in trust further to receive the rents, issues, income and profits of the same, and of all and any other property into which the same or any other part thereof may be converted, to and for the use of the above-named seven children of said John J. Valentine, deceased, in the proportions to which each is entitled, as aforesaid, with full power and authority to the said trustee, in its discretion, at [28] any and all times to sell all or any part of said property and to reinvest the proceeds thereof, or any part thereof, in any other property, real or personal, and the same to again sell, invest or reinvest in the same manner at all times and as often as said trustee may deem necessary and for the best interests of said beneficiaries, with full power and authority to make all such alterations or repairs upon any of said real property, or any real property into which the said personal property may be converted, or in which the same may be invested or reinvested, as it may from time to time think proper, also with full power to insure the same or such part or portion of the same as it may think proper in such sums and with such insurance companies as it may think proper, and with further authority to lease the same or any portion thereof on such terms and conditions and for such time as it may think proper; and in trust further, with full power and authority in case of loss or destruction by fire, or otherwise, of any of the buildings or improvements on any of said real property, to rebuild and reconstruct the same in such manner, style or dimen-

sions as it shall see fit and pay therefor out of said insurance moneys, and if said insurance moneys should not be sufficient, then out of any other property belonging to said trust funds; and with further authority and power to pay and discharge all taxes, assessments, charges, costs and expenses that may accrue against or be levied upon, or become a charge upon any or all property of said trust estate, and whether the taxes be City, County, Federal or Municipal, or whatever name or nature the same may be; and upon further trust to pay the said net income of the rents, issues and profits of said property, or of any property into which the same may be [29] converted, invested or reinvested, after deducting all charges, expenses and costs, quarterly, or semi-annually, to each of the said children of the said John J. Valentine, deceased, in the proportions above mentioned; and provided, further, that all costs, expenses, burdens, taxes and charges of every kind or character during the continuance of said trust, shall be borne by each of the above-named beneficiaries in the same proportions, and the property held in trust for them shall be subjected to such charges in said proportions; and in trust further, that when the youngest of said above-named children has attained his or her majority, that the trust shall thereupon cease, and the properties herein distributed in trust shall vest in the proportions hereinabove mentioned in the above-named children of said John J. Valentine, deceased, or in the heirs of any child who may die before the youngest of said children shall reach his or her majority, provided, however, that if any of said children

should die before the youngest of said children reaches his or her majority and should die never having been married, the proportionate share of such beneficiary dying shall become a portion of said trust fund and property and shall vest in equal shares in the remaining beneficiaries when the youngest of such children shall reach his or her majority, and provided further, that if the youngest child, Philip Crenshaw Valentine, should die before reaching the age of majority, then the vesting of the trust property shall take place when Eliza Ruth Valentine reaches the age of majority, and if both should die before reaching the age of majority, then the vesting as herein mentioned shall take place when Dudley Blanchard Valentine reaches the age of majority, and provided further, that if Dudley Blanchard [30] Valentine, Eliza Ruth Valentine and Philip Crenshaw Valentine should all die under the age of majority, then the vesting as herein mentioned shall take place when William George Valentine reaches the age of majority, and provided further, that if the last four named children of John J. Valentine, deceased, should all die before reaching the age of majority, then the vesting as herein provided shall take place upon the death of the last of said last-named four children before reaching the age of majority.

Should said trustee not pay the United States of America any legacy tax under the Act of June 13, 1898, upon the shares of said beneficiaries, then no deduction shall be made on account of said legacy tax from the share of each of said beneficiaries, and such respective sums shall be held in trust for the re-

spective benefit of the beneficiaries as hereinabove provided.

XXI.

Nothing herein shall be construed as distributing any lot in any cemetery corporations owned by deceased at the time of his death, but such lot shall descend in regular line of succession to the heirs at law of the said John J. Valentine, deceased.

XXII.

It is further ordered, adjudged, and decreed, that a certified copy of this decree be recorded in the office of the County Recorder of the Counties of Alameda, San Benito, and Santa Clara, State of California.

XXIII.

It is further ordered, adjudged and decreed that upon the said executor recording said certified copies, as aforesaid, [31] and producing good and sufficient receipts for the distribution herein ordered, that it be released and discharged from its obligation as such executor.

Done in open court this 11th day of March, 1903.

S. P. HALL,

Judge of said Superior Court. [32]

SCHEDULE "A."

1. Cash. ..... $
2. Six Hundred (600) shares of the capital stock of the Pacific Gas Improvement Company, a corporation, represented by certificates numbers 383, 384, 385, 386, 387, 388.
3. Two Hundred (200) shares of the capital stock of the San Francisco Gas and Electric Com-

pany, a corporation, represented by certificates numbers 10,812, 10,815, 10,813, 3,189.

4. Eleven Hundred and Ninety (1190) shares of the capital stock of the Pacific States Telephone and Telegraph Company, a corporation, represented by certificates numbers 21, 76, 77, 78, 79, 262, 80.
5. Twelve(12) shares of the capital stock of the Pacific Surety Company, a corporation, represented by certificates numbers 10 and 210.
6. Fifty (50) shares of the capital stock of the Saratoga and Los Gatos Real Estate Association, a corporation, represented by certificate number 9.
7. Three Hundred and Twenty-five shares of the capital stock of Wells, Fargo & Co., a corporation, represented by certificates numbers 19-058, 19345, 19347 and certificate #
8. Household furniture, household goods, fixtures, and personal property contained in the former residence of deceased in East Oakland, including library, statuary, stable, horses, harnesses, and carriages. [33]

SCHEDULE "B."

1. That certain piece and parcel of land situate in the County of San Benito, State of California, and described as follows: Part of the rancho San Felipe y Ausaymas described as follows: Beginning at a point in the center of the Tequesquita Creek at the Southeast corner of E. J. Turner's land, being the Southwest corner of the Touchard Tract, so-called, and running thence along said Turner's land

North 14° West Sixty-three (63) chains to the Northeast corner of said Turner's land on the South side of a road Fifty (50) links wide; thence North 76° East along said road Thirty and 30/100 (30.30) chains to a post upon the West side and line of James Dunne's land and to center of road known as Hollister and San Felipe Road; thence along said Dunne's line and center of said Road, South 14° East Seventy-four (74) chains, to the center of said Tequesquita Creek at the Southwest corner of the land of said James Dunne and the Southeast corner of the Touchard Tract; thence down said Creek and center thereof following the meandering of the channel thereof, westward to the place of beginning.

Containing Two Hundred and Ten acres of land. Situated about three-fourth miles Easterly from the Pacheco School House in San Felipe District.

Less, however, the following described parcel of land which was in the lifetime of said John J. Valentine, conveyed by him, viz.:

Beginning at the Southwest corner of the intersection of the Hollister and San Felipe Road with the Pacheco School House Road and running along the South side of the said Pacheco School-house Road, South 79° West 466.69 feet to a [34] stake; thence South 14½° East 466.69 feet to a stake; thence North 79° East 466.69 feet to a stake on the West side of the Hollister and San Felipe Road; thence North 14½° West 466.69 feet along the West side of said last named Road to the place of beginning, containing five acres of land situate about ¾ of a mile East of the Pacheco School-house.

Said last described parcel of land having been conveyed by John J. Valentine and D. C. Riddell to L. A. Chase by deed dated August 2d, 1889, and recorded in the office of the County Recorder of the County of San Benito August 24th, 1889, in Book 10 of Deeds, page 532.

2. The following described piece and parcel of land situate in the County of Santa Clara, State of California, described as follows: Beginning at the point of intersection of the West line of land formerly owned by C. H. Lapham with the center line of the road to McCarthysville; running thence along the West line of land formerly owned by said Lapham, North 28.70 chains to the Southeast corner of land of S. Goodenough; thence along the South line of land of said Goodenough, S. 89° 39′ W. 37.78 chains to the East line of Saratoga Avenue; thence along the East line of said Saratoga Avenue S. 10° 40′ W. 3.00 chains, S. 6° 55′ W. 4.00 chains, S. 1° 20′ W. 7.00 chs., S. 2° 50′ W. 5.00 chains, S. 5° 33′ W. 4.00 chains, and S. 7° 15′ W. 3.24 chains to the Northwesterly corner of the Methodist Church Tract; thence along the North line of said Church Tract N. 89° E. 5.52 chains to the Northeasterly corner of said Church Tract; thence along the East line of said Church Tract S. 0° 16′ E. 3.26 chs. to the center of said road to McCarthysville; thence along the [35] center of said road N. 88° 43′ E. 34.34 chains to the place of beginning. Containing 111 60/100 acres of land and being a portion of the Quito Rancho. Courses true Mag. Var. 16° 45′ East as surveyed by John Coombe, Surveyor and C. E., Mch. 9, 1885.

Less the lands conveyed by J. J. Valentine, deceased, to Simon Hasterlick by deed dated January 12th, 1895, recorded in the office of the County Recorder of said County of Santa Clara in Vol. 177 of Deeds, page 234, and which last named lands are described as follows:

Commencing at a point in the center line of the Williams Road and being the common corner for lands of E. E. Maynard, formerly of C. H. Lapham and John J. Valentine, and running thence Northerly along the line between lands of said Maynard and said Valentine 28.73½ chs. to the line between lands of J. T. Orkney (formerly Goodenough) and said Valentine; thence West along the South line of land of Orkney 3.47 1/10 chs. to a stake; thence S. 28.79 3/10 chs. to the center line of said Williams Road; thence Easterly along the center line of said Williams Road 3.47 4/5 chs. to the place of beginning. Containing 10 acres of land as surveyed by Shackelford and Fisher in December 1894, and being a portion of the Quito Rancho.

And less the lands conveyed by J. J. Valentine, deceased, to Albert Hasterlick and others by deed dated January 12, 1895, recorded in the office of the County Recorder of said County of Santa Clara in Vol. 177 of Deeds page 256, and which last-named lands are described as follows:

Commencing at a point in the center line of the Williams Road 3.47 4/5 chs. Westerly from the common corner of lands [36] of E. E. Maynard, formerly of C. H. Lapham and John J. Valentine, and

running thence N. 28.79 3/10 chs. to the line between lands of J. T. Orkney (formerly Goodenough) and said Valentine; thence West along the South line of land of said Orkney 3.47 2/10 chs. to a stake; thence S. 28.84 6/10 chs. to the center line of said Williams Road; thence Easterly along the center line of said Williams Road 3.47 3/10 chs. to place of beginning. Containing 10 acres of land as surveyed by Shackelford and Fisher in December, 1894, and being a part of the Quito Rancho.

And less the lands conveyed by J. J. Valentine, deceased, to Charles S. Hemphill by deed dated November 27th, 1895, recorded in the office of the County Recorder of said County of Santa Clara in Vol. 182 of Deeds, page 576, and which last-named lands are described as follows:

Commencing at a point in the center line of the Williams Road 6.95 1/10 chs. Westerly from the West line of lands of E. E. Maynard, the same being the West line of lands of Hasterlick, and running thence North along the West line of lands of Hasterlick 28.84 6/10 chs. to the South line of lands of Orkney (formerly Goodenough); thence Westerly along the South line of lands of Orkney 3.463 chs.; thence South 28.902 chs. to the center line of Williams Road; thence Easterly along the center line of said Williams Road 3.464 chs. to the point of beginning. Containing 10 acres of land, known as Lot 3 of the Valentine Tract as surveyed by Shackelford and Fisher, and being a portion of the Quito Rancho.

3. All that certain piece or parcel of land situate in the City of Oakland, County of Alameda, State

of California, bounded and described as follows, to wit: [37]

Commencing at the corner formed by the intersection of the Northwesterly line of Thirteenth (13th) Avenue (formerly Walker Street) with Northeasterly line of East Twentieth (20th) Street (formerly Humbert Street); thence Northeasterly along said line of Thirteenth (13th) Avenue, Two Hundred (200) feet; thence at right angles Northwesterly and parallel with the Northeasterly line of East Twentieth (20th) Street, Three Hundred (300) feet to the Southeasterly line of Twelfth (12th) Avenue extended; thence at right angles Southwesterly and parallel with the Northwesterly line of Thirteenth (13th) Avenue and along the Southeasterly line of said Twelfth (12th) Avenue, Twenty-five (25) feet; thence at right angles Southeasterly and parallel with the Northeasterly line of East Twentieth (20th) Street, Seventy-five (75) feet; thence at right angles Southwesterly and parallel with the Northwesterly line of Thirteenth (13th) Avenue One Hundred and Seventy-five (175) feet to the Northeasterly line of East Twentieth (20th) Street, and thence Southeasterly along said line of East Twentieth (20th) Street, Two Hundred and Twenty-five (225) feet to the point of commencement.

Being a part of Block No. One Hundred and Twenty-seven (127) as laid down and delineated on Higley's Map of the Town of Clinton of record in Liber "B" of Deeds, page 537, in the office of the County Recorder of said County of Alameda, with the improvements thereon.

[Endorsed]: Filed Mar. 11, 1903. John P. Cook, Clerk. By H. E. Magill, Deputy Clerk [38]

State of California,
County of Alameda,—ss.

I, John P. Cook, County Clerk of said County and ex-officio Clerk of the Superior Court in and for said County, hereby certify that I have compared the above and foregoing copy with the original Decree of Final Distribution and settling Final Account John J. Valentine #7723, and that the same is a full, true and correct copy of such original in the above-entitled matter and of the whole thereof, as the same now remains of record, and on file in the office of the Clerk of said Superior Court.

Witness my hand with the seal of said Superior Court affixed, at the City of Oakland, this 11th day of March A. D. 1903.

[Seal] JOHN P. COOK,
County Clerk.
By H. E. Magill,
Deputy Clerk. [39]

Exhibit No. 3.

UNITED STATES INTERNAL REVENUE.
NOTICE IN DUPLICATE BY EXECUTOR, ADMINISTRATOR, OR TRUSTEE RELATIVE TO LEGACIES.

Every executor, administrator, or trustee having in charge or trust any legacy or distributive share exceeding the sum of ten thousand dollars in actual value shall give NOTICE in writing to the collector or deputy collector of Internal Revenue of the dis-

trict where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust.—Act of March 2, 1901, 31 Statutes, page 948.

JOHN C. LYNCH,
Collector, 1st District of Cal., San Francisco, Cal.

Sir:

In accordance with the requirements of Section 30 of the Act of June 13, 1908, known as the "War Revenue Law" as amended by the Internal-Revenue Act of March 2, 1901, you are hereby notified that the undersigned is the executor of the estate of J. J. Valentine deceased, who died on the 21st day of December, 1901; that the value of the personal estate on the date of death was about Three hundred Eighty two Thousand nine hundred Fifty-five and 03/100 Dollars, and that there will be heirs, legatees, or persons beneficially interested in said estate, each to an amount in excess of ten thousand dollars, as follows: [40]

Name of Each Beneficiary.	Interest of Each Beneficiary (Estimated). Dollars.	Cts.
Alice M. B. Valentine	86200	92
Samutha J. Valentine	3000	00
Francis J. Norvell	3000	00
Edward C. Valentine	17502	91
William George Valentine	17502	91
Ethel Stein Valentine	31416	89
Duoler B. Valentine	21761	46
Eliza R. Valentine	35676	41
Phillip C. Valentine	31038	41
J. J. Valentine, Jr.	17502	91

Dated at San Francisco this 29 day of April, 1903.

Note.—This estate will be settled in the Probate Court of Alameda County, at Oakland, Cal.

(Signed): UNION TRUST COMPANY OF SAN FRANCISCO.
By HELLER & POWERS,
Its Attorneys.

Residence: 2 Montgomery St., San Francisco Cal.

(Signed):————————
Residence:————————
(Signed):————————
Residence:————————

[Endorsed]: U. S. Internal Revenue. Notice (In Duplicate) of Union Trust Company of San Francisco, Executor of the Estate of J. J. Valentine, Deceased.————, 190— To the Collector of the 1st District of Cal. [41]

Exhibit No. 4.

COPY OF WILL.

IN THE NAME OF GOD AND OF OUR LORD JESUS CHRIST, AMEN.

I, JOHN J. VALENTINE, a resident of the City of Oakland, County of Alameda, State of California, being of sound mind and disposing memory, and appreciating the uncertainties of life do make and publish this my last will and testament;

After all my just debts shall have been paid from available cash assets, or from the conversion into cash of as much of the other holdings as may be requisite, I give and bequeath as follows:

FIRST: To my sister Samantha I. Valentine, the sum of three thousand dollars ($3,000.00);

SECOND: To my niece Frances V. Norvell the sum of three thousand dollars ($3,000.00);

From these bequests to my near kindred I omit my married sisters Mary Emily Campbell, Susan Sarah Josephine Norvell, not through any oversight or want of brotherly affection and solicitude for them, but because I have reason to think, as they will understand, that they have been and are provided for; and my brother James Thurman Valentine is omitted in the same way, because I consider him capable of providing for himself.

THIRD: to my beloved wife, Alice M. B. Valentine, I give and bequeath the sum of sixty-five thousand dollars ($65,000.00) and, in addition thereto, I give and devise to her the family homestead in East Oakland, California, known as "Cedar Croft" including all the real and personal property and household effects connected therewith or in anywise appertaining thereto, the same being valued, together at Forty-five thousand dollars ($45,000.00). [42]

FOURTH: All the residue of my estate, including life insurance, I wish to have cared for and handed to the best advantage and proceeds apportioned to my seven children as follows: Edward Cahill twenty-five thousand dollars ($25,000.00); Ethel Stein, forty thousand dollars ($40,000.00); John Joseph Jr. twenty-five thousand dollars ($25,000.00), William George, twenty-five thousand dollars ($25,000.00); Dudley Blanchard, twenty-five thousand ($25,000.00); Eliza Ruth forty thousand dollars ($40,000.00) Philip Crenshaw thirty five

thousand dollars ($35,000.00) or in those proportions to as many of them as may survive me; upon the express condition, however, that the sum total of bequests to the seven children named or such of them as may survive me, be, and shall be held in trust by the Union Trust Company of San Francisco until the youngest shall have attained his or her majority; provided, further, that Edward Cahill, Ethel Stein, John Joseph Jr. and William George, to whom the proceeds of three insurance policies made payable to their mother Mary F. Valentine and aggregating twenty seven thousand dollars ($27,000.00) revert in equal shares by reason of her decease, do allow the said shares to become a part of the trust fund; and that if they or any of them decline to do so, then the proportionate amount coming to each one of them that so declines (from the said three insurance policies) shall be deducted from the amount above set down as his or her alloted proportion of the trust fund, and shall to that extent diminish his or her proportionate interest in the remainder of said trust funds. Income from the whole to be paid quarterly or semi-annually to each beneficiary in the proportion indicated in the above allotment and proviso.

If any of the said children should die unmarried the [43] proportionate bequest due the same shall revert to the remaining beneficiaries under this clause:

FIFTH: In case of my death by accident, the bequest to my wife, Alice M. B. Valentine, will be increased by the sum of twenty thousand dollars ($20,000.00) from proceeds of accident insurance;

the remainder of proceeds from such source to be divided among my seven children in the proportions stated in Clause Fourth with its proviso;

SIXTH: I hereby nominate and appoint the UNION TRUST COMPANY OF SAN FRANCISCO, of the City and County of San Francisco, State of California, the Executor of this my last will and testament, and repeat my injunction that the bequests to my children be held in trust until the youngest shall attain his or her majority.

Pending the administration of my estate I authorize and empower my said Executor at its discretion, and without control or supervision of any court of law, to sell and dispose of any or all of said estate, except that which will be subject to my wife's direction under clause Third hereof whether real or personal, and to make valid transfers and conseyances thereof.

LASTLY: I hereby revoke any and all wills and testaments by me heretofore made.

IN WITNESS WHEREOF, I have caused the foregoing to be written, marked the first two pages with my name, and do hereunto set my hand and seal at the City of Oakland, County of Alameda, State of California, the twenty fourth day of August A. D. Nineteen hundred and One (1901).

(Signed) JNO. J. VALENTINE. [Seal]

[44]

The foregoing instrument consisting of two pages besides this, was, at the date thereof by the said John J. Valentine signed and sealed and published as and declared to be his last will and testament in the pres-

ence of us, who, at his request and in his presence, and in the presence of each other subscribed our names as witnesses thereto.

(Signed) NATHAN STEIN,

Residing at 1045 Santa Clara Avenue, Alameda, Cal.

C. H. GARDINER,

Residing at 1370 Nineteenth Avenue, East Oakland, Cal. **[45]**

In the Superior Court of the County of Alameda, State of California.

In the Matter of the Estate of JOHN J. VALENTINE, Deceased.

STATEMENT SHOWING CLEAR VALUE OF PERSONAL PROPERTY.

RECEIPTS.

1. Property per inventory.

600 shares Gas Impr. Improvement Co...	$ 24000.00
200 shares San Francisco Gas & Electric Co.	9000.00
1190 shares Pacific States Telephone & Telegraph Co.	142800.00
12 shares Pacific Surety Co.....	1200.00
50 shares Saratoga & Los Gatos Real Estate Assn.....	2500.00
800 shares Wells, Fargo & Co.....	168000.00
Promissory note of Charles S. Hemphill..	2340.00
Household furniture, goods, fixtures and personal property in former home of deceased, including library, statuary,	

stables, horses, harness and carriages	$ 10000.00
Cash	2082.83
2. Property per Accounts of Executor.	
Dividend Pacific Surety Co	18.00
From Estate of George S. Ladd	229.20
From Pacific States Telephone & Telegraph Co.	1785.00
From Wells, Fargo & Co	3950.00
From Wells, Fargo & Co	50.00
From New York Life Insurance Co	10000.00
From New York Life Insurance Co	5000.00
Total	$382,955.03

[46]

DISBURSEMENTS.

Disbursements as per Accounts.

Paid Ben Arner for photographing will	$ 25.00
Paid D. B. Richards, Notary fees	2.00
Paid Oakland Enquirer Publishing Company for probate notices	7.50
Paid Oakland Enquirer Publishing Company	5.00
Paid D. B. Richards Notary Public fees (County Clerk's Certificate)	.50
Paid D. B. Richards, Notary Fees and car fare	1.10
County Clerk's fees	7.00
Paid Geo. W. McConnell for copy abstract of San Benito lands	1.00

Paid San Jose Abstract Company continuance of abstract	5.00
Paid Gus L. Mix & Co. for searching records J. J. Valentine property in Oakland	2.50
Heller & Powers for expenses	3.50
G. H. Gardiner, appraiser's fees and expenses	32.50
E. P. Vandercook, appraiser's fees	28.00
D. B. Richards, notary fees to release of mortgage, etc	2.50
D. B. Richards, notary fees in re affidavit to inventory	.50
Paid St. Matthews School as per sworn statement February 12, 1902	56.90
Wells, Fargo & Co. express for amount of claim	1989.31
Paid Heller & Powers for costs, etc	11.10
Paid Chas. G. Henshaw, appraiser's fees	25.00
Paid Albert Brown, undertaker	405.00
For certified copy of first account of executor	.50
Laurel Hill Cemetery Assn. to Jul. 1, 1902	27.00
W. T. Hess, notary fee in re account	.50
Paid Heller & Powers for professional services, etc	2.35
Payment of the following claims allowed and ordered to be paid:	
Shreve & Co	76.00
H. Liebes & Co	30.00

Taft & Pennoyer	$ 132.12
Nathan Dohrman & Co	30.55
Roos Bros	30.00
Raphael Weil & Co	95.90
Herrman Bros	81.45
Davis Schoenwasser & Co	20.00
Dr. A. Liliencrantz	84.00
J. R. Gates & Co	7.55
Dr. E. H. Hopkins	35.00
Saratoga & Los Gatos Real Estate Assn.	1000.00
Jas. S. White & Co	10.00
Daniel & Pancoast for monument	1296.95
Paid Union Trust Co. of San Francisco, Executor, fees as follows:	
$1000.00 at 7% $ 70.00	
9000.00 at 5% 450.00	
10000.00 at 4% 400.00	
30000.00 at 3% 900.00	
50000.00 at 2% 1000.00	
348051.02 at 1% 3480.51	
	6300.51
Fees to close estate, including recording of decree of distribution in Counties of Alameda, San Benito & Santa Clara, estimated	100.00
Payment of Claim of Wells, Fargo & Co.	102630.00
Attorneys fees Heller & Powers	3250.00
Attorneys fees paid Chas. E. Snook	500.00

[47]

RECAPITULATION.

Receipts	$382,955.03
Disbursements	118,352.27
Balance	$264,602.76
Of which ⅓ thereof	82,200.92
Under the decree of final distribution is distributed to the widow of said deceased, Alice M. Valentine, leaving a balance of	$182,601.84
For distribution to the Union Trust Company of San Francisco as Trustee for the beneficiaries.	

Under this decree of final distribution said residue is distributed to said Trustee for the benefit of the beneficiaries hereinafter named in the proportions and in the manner following:

For the benefit of Edward Cahill Valentine 25/215 thereof, less $2543.82;

For the benefit of Ethel Stein Valentine 40/215 thereof, less $657.80;

For the benefit of John J. Valentine, Jr., 25/215 thereof less $2543.82;

For the benefit of William George Valentine 25/215 thereof less $2543.82;

For the benefit Dudley Blanchard Valentine 25/215 thereof plus $1714.68;

For the benefit of Eliza Ruth Valentine 40/215 thereof plus $3600.63;

For the benefit of Phillip Crenshaw Valentine 35/215 thereof plus $2971.98.

These proportions of the residue, with the addi-

tions and deductions above shown, result in the distribution to said trustee for the benefit of said beneficiaries of the following amounts as clear value of personal property so distributed, *viz.:*

For the benefit of Edward Cahill Valentine	$17502.91
For the benefit of Ethel Stein Valentine	31416.89
For the benefit of John J. Valentine	17502.91
For the benefit of William George Valentine	17502.91
For the benefit of Dudley Blanchard Valentine	21761.40
For the benefit of Eliza Ruth Valentine	35676.41
For the benefit of Phillip Crenshaw Valentine	31038.41

The deceased John J. Valentine died on December 21, 1901. His youngest living child at the time of his death was and is Phillip Crenshaw Valentine, who was born May 7th, 1899, and who will reach the age of 21 years on May 7, 1920. The trust will continue for 18⅜ years.

The schedules attached hereto are based:

1. On the annuity.
2. On the value of the funds held in trust at the time of vesting.

[Endorsed]: In the Matter of the Estate of John J. Valentine, Deceased. Statement Showing Clear Value of Personal Property. [48]

UNITED STATES INTERNAL REVENUE.

LEGACIES AND DISTRIBUTIVE SHARES.

Sections 29 and 30, Act of June 13, 1898, as

amended by Sections 10 and 11 of an Act approved March 2, 1901.

SCHEDULE of Legacies or Distributive Shares arising from personal property of any kind whatsoever, being in charge or trust of Union Trust Co. of San Francisco as Executor, said property passing from John J. Valentine, deceased, of the City of Oakland, County of Alameda, and State of California, who deceased upon the 21st day of December, 1901, to the persons hereinafter mentioned, by will or by the intestate laws of California; also the amount of such property, together with the amount of duty or tax which has accrued or should accrue thereon, agreeably to the provisions of the Internal-Revenue Laws of the United States.

Appraised value of Personal Estate....	$382,955.03
Total amount legal debts and expenses to which the personal property is liable	118,352.27
Balance, clear value of Personal Estate..	$264,602.76

[49]

Lines.	1. Names of Persons Entitles to Beneficial Interest in said Property.	2. Age.	3. Relationship of Beneficiary to Person Who Died Possessed.	4. Clear Value of Legacy.	5. Legacies Exempt.	6. Amount Taxable.	7. Rate for Every $100.	8. Amount of Tax.	9. Remarks.
				Dollars. Cents.	Dollars. Cents.	Dollars. Cents.	Dollars. Cents.	Dollars. Cents.	
1	Alice M. B. Valentine	over 21	Wife	86,200 92	86,200 92	None	None	None	
2	Samantha G. Valentine	"	Sister	3,000 00	3,000 00	"	"	"	
3	Francis V. Norvell	"	Niece	3,000 00	3,000 00	"	"	"	
4	Edward C. Valentine	"	Son	17,502 91		17,502 91	75	131 27	
5	J. J. Valentine Jr.	"	"	17,502 91		17,502 91	75	131 27	
6	William George Valentine	under 21	"	17,502 91		17,502 91	75	131 27	
7	Ethel Stein Valentine	over 18	Daughter	31,416 89		31,416 89	1 12½	353 44	
8	Dudley B. Valentine	under 21	Son	21,761 40		21,761 40	75	163 21	
9	Eliza R. Valentine	under 18	Daughter	35,676 41		35,676 41	1 12½	401 36	
10	Philip C. Valentine	under 21	Son	31,038 41		31,038 41	1 12½	349 18	
11									
12									
13									
14									
15									
16									
17									
18									
19									
20									
21									
22									
23									
24									
			Total	264,602 76	92,200 92	172,401 84		1661 00	

This return is an amended return made at the suggestion of the revenue officers and is paid under protest, as the undersigned claims that none of the contingent interests above named vested prior to July 1st, 1902.

Dated at San Francisco, this 29th day of April, 1903.

UNION TRUST COMPANY OF SAN FRANCISCO.

(Signed) CHAS. J. DEERING.

Chas. J. Deering do swear that the above statement is, to the best of my knowledge and belief, just and true, and that I have taken all the means in my power to make it so.

(Signed) CHAS. J. DEERING.

Subscribed and sworn to before me this 30 day of April, A. D. 1903.

[Seal] (Signed) D. B. RICHARDS,
Notary Public, San Francisco, Cal. [51]

Exhibit No. 5.

UNITED STATES INTERNAL REVENUE.
LEGACIES AND DISTRIBUTIVE SHARES.

Sections 29 and 30, Act of June 13, 1898, as Amended by Sections 10 and 11 of an Act Approved March 2, 1901.

SCHEDULE of Stocks, Bonds, Notes, Securities, and other personal property in charge or trust of Union Trust Company of San Francisco as Executor, said property passing from John J. Valentine, deceased, of the City of Oakland County of Alameda and State of California, who deceased upon the 21 day of December, 1901, to the persons mentioned in

the accompanying Form No. 419; also the par value of said Securities and their market value at the date of the death of the testator.

STOCKS.

No. of Shares.	Description of.	Total Par Value.	Total Market Value.
1.	2.	3.	4.
600	Pac. Gas Improvement Co.	$	$ 24000.00
200	S. F. Gas and Electric Co.		9000.00
1190	Pac. States Tel. & Tel. Co.		142800.00
12	Pac. Surety Co.		1200.00
50	Saratoga & Los Gatos Real Estate Assn.		2500.00
800	Wells Fargo & Co.		168000.00
	Total.....	$....	$347500.00

[52]

PROMISSORY NOTES.

No. of.	Description.	Par Value.	Actual Value.
1.	2.	3.	4.
	Promissory note of Charles S. Hemphill, which said note was dated Dec. 2, 1895, and was by said Hemphill paid in full with the sum of $2340.00, on May 3, 1902.....	$	$ 2340.00
	Total forward..$		$2340.00

[53]

CASH AND MISCELLANEOUS.

1.	2.
Household furniture, goods, fixtures and personal property in the former house of deceased, including library, statuary, stable, horses, harness and carriages	$ 10000.00
Cash	2082.83
Dividend accruing on securities prior to decease of testator, as follows:	
Pac. Surety Co	18.00
Pac. Tel. & Tel. Co	1785.00
Wells-Fargo & Co	3950.00
" " " "	50.00
Proceeds of two Life Insurance Policies from N. Y. Life Insurance Company	15000.00
From Estate of Geo. Ladd	229.20
	$33115.03

First Dist., State of California.

Schedule of Stocks, Bonds, Notes, other Securities, and other Personal Property. Estate of John J. Valentine, Deceased.

Union Trust Company of San Francisco, Executor.

Examined and approved by me this —— day of ————, 190—.

JOHN C. LYNCH, Collector.

Assessment Division. [54]

Exhibit No. 6.

NOTICE OF AND DEMAND FOR LEGACY TAXES ASSESSED.

UNITED STATES INTERNAL REVENUE,
OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
First District, State of California.

May 22nd, 1903.

List for Month
of April, 1903
Div.....
Union Trust Co., Executor in Estate of John J. Valentine.

You are hereby notified that a tax, under the Internal-Revenue Laws of the United States, amounting to $1,661.00/100 Dollars, the same being a tax upon Legacies and Distributive Shares, has been assessed against you by the Commissioner of Internal Revenue, and transmitted by him to me for collection. Demand is hereby made for this tax, which is due and payable before distribution to the legatees or any parties entitled to beneficial interest therein, and unless paid before the day of distribution, it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

Payment may be made to John C. Lynch at San Francisco.

JOHN C. LYNCH,
Collector.

(Bring this notice with you.) [55]

Exhibit No. 7.

No. 741764.

UNITED STATES INTERNAL REVENUE,
Collector's Office, First District of California.

(Form No. 1)
Revised April 28, 1876.

May 27, 1903.

RECEIVED of UNION TRUST CO. Executor, one thousand six hundred Sixty one & 00/100 Dollars, Tax on Legacy—Estate of
JOHN J. VALENTINE $1661.00—San Francisco .....$
Unassessed penalty .....$
Interest—years—months .....$

$1661.00

Said amount of Tax being assessed on Legacy list for April, 1903, $1661.00.

JOHN C. LYNCH,
Collector. [56]

Exhibit No. 8.

San Francisco, Cal., May 26th, 1903.

To the Hon. J. C. Lynch,
Collector, Internal Revenue,
First District of California.

We hand you herewith our check for $1,661.00, the same being paid by the Union Trust Company of San Francisco as Trustee of Edward Cahill Valentine; J. J. Valentine, Jr.; William George Valentine; Ethel Stein Valentine, Dudley B. Valentine; Eliza

R. Valentine and Phillip C. Valentine, as and for internal revenue tax under the Act of June 13th, 1898, as amended by Act approved March 2nd, 1901, which sum is paid by said Union Trust Company under protest, because they claim that none of the said estate has been distributed to the beneficiaries under the trust in the will of John J. Valentine, deceased, and is a contingent interest which was not vested prior to July 1st, 1902, and is therefore relieved from the tax under and by virtue of an Act of Congress entitled "An Act to provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable or educational character, for the encouragement of art," etc., passed June 27, 1902.

Respectfully,

UNION TRUST COMPANY OF SAN FRANCISCO,

Trustee under the trusts created by the Will of John J. Valentine, deceased, formerly executor of the last will and testament of John J. Valentine, deceased.

By I. W. HELLMAN, Jr.,
Vice-President and Manager.

CHAS. J. DEERING,
Secretary. [57]

Exhibit No. 9.

CLAIM UNDER SERIES 7, NO. 14, REVISED, AND SERIES 7, NO. 27, SUPPLEMENT NO. 1, FOR TAXES IMPROPERLY PAID, OR REFUNDABLE UNDER REMEDIAL STATUTES AND FOR AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS.

U. S. INTERNAL REVENUE.

State of California,
City and County of San Francisco,—ss.

I. W. HELLMAN, Jr., of the City of San Francisco and State and County aforesaid, being duly sworn according to law, deposes and says, that he is the manager of Union Trust Company of San Francisco, a corporation, that it is engaged in the business of a trust company for trust purposes; that upon the 28th day of May, A. D. 1903, it was assessed an internal-revenue tax of Sixteen hundred and sixty-one ($1661.00) dollars, because of alleged taxes due from heirs of the Estate of John J. Valentine, deceased, for Inheritance tax, which amount it afterwards, on the 28th day of May, A. D. 1903, paid to John C. Lynch, Esq., Collector of Internal Revenue for the First District of California, and which amount, as this deponent verily believes, should be refunded for the reasons, set forth in the paper hereto attached and marked Exhibit "A."

And this deponent now claims that, by reason of the payment of the said sum of Sixteen Hundred and Sixty-one ($1661.00) it is justly entitled to have the sum of sixteen hundred and sixty-one ($1661.00)

dollars refunded, and it now asks and demands the same or such greater amount as the Commissioner of Internal Revenue may find to have been erroneously paid, or to be refundable under remedial statutes. And this deponent further makes oath that he has not heretofore presented any claim for the [58] refunding of the above amount or any part thereof.

I. W. HELLMAN, Jr.,

For Union Trust Company of San Francisco, Executor of the last Will and Testament of John J. Valentine.

Sworn to and subscribed before me, this 10th day of June, A. D. 1903.

[L. S.] D. B. RICHARDS,
Notary Public. [59]

EXHIBIT "A."

That said payment was made under protest by said UNION TRUST COMPANY OF SAN FRANCISCO, on the ground that none of the contingent interests of the heirs on which the tax was levied had become vested prior to July 1st, 1902:

That in that behalf deponent says:

That John J. Valentine died on the 21st day of December, 1901, leaving a will which was duly admitted to probate by the Superior Court of the County of Alameda, State of California, and the said UNION TRUST COMPANY OF SAN FRANCISCO was duly appointed as the Executor of the last Will and Testament of said deceased, and, until the distribution under said estate to it as trus-

tee, continued to act as such Executor:

That no distribution of said estate of any kind took effect until the 11th day of March, 1903, and, on said last named date, there was distributed to UNION TRUST COMPANY of SAN FRANCISCO, in trust for the following named beneficiaries, personal estate of the value set opposite their respective names, viz.:

Edward C. Valentine	$17,502.91
William George Valentine	17,502.91
Ethel Stein Valentine	31,416.89
Dudley B. Valentine	21,761.40
Eliza R. Valentine	35,676.41
Philip C. Valentine	31,038.41
J. J. Valentine, Jr.	17,502.91

to be held by it in trust and the income thereon paid to the said beneficiaries until the youngest of said children should have attained his or her majority;

That Philip C. Valentine is the youngest of said children, and will reach his majority on the 7th day of May, 1920, and not before; [60]

That none of said children have any vested interests whatsoever in any portion of said estate, save and except the income thereof;

That said income in each instance is of so small amount that the annuity value thereof under the Rules of the Internal Revenue Department for the purposes of Legacies is much less than ten thousand dollars, and is in fact in the neighborhood of one thousand dollars.

That all of these facts were set forth in the original return made by the said Executor and Trustee, but

the Internal Revenue Department refused to accept the same unless the same should be amended in such a way as to require the payment by it of $1661.00 in proportions as follows:

Edward C. Valentine	$131.27
William George Valentine	131.27
Ethel Stein Valentine	353.44
Dudley B. Valentine	163.21
Eliza R. Valentine	401.36
Phillip C. Valentine	349.18
J. J. Valentine, Jr	131.27
	$1,661.00

which was done under protest.

That none of said payments were required by law, and all of them were made by the Executor because of the fact that the officers of the Department required that it should be paid before the protest could be entered.

[Endorsed]: Filed May 19, 1905. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk. [61]

Summons.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee Under the Trust Declared by the Last Will of JOHN J. VALENTINE, and EDWARD C. VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE, PHILIP C. VALENTINE, and J. J. VALENTINE, Jr., ETHEL STEIN VALENTINE and WILLIAM GEORGE VALENTINE,

Plaintiffs,

vs.

JOHN C. LYNCH, Collector of Internal Revenue for the First District of California,

Defendant.

Action Brought in the Said Circuit Court, and the Complaint Filed in the Office of the Clerk of Said Circuit Court, in the City and County of San Francisco.

The President of the United States of America, Greeting: To John C. Lynch, Collector of Internal Revenue for the First District of California, Defendant.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the

Northern District of California, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiffs will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or they will apply to the Court for any other relief demanded in the Complaint. [62]

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of May, in the year of our Lord one thousand nine hundred and five, and of our Independence the one hundred and twenty-ninth.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 19 day of May, 1905, and personally served the same on the 19 day of May, 1905, upon John C. Lynch, Collector of Internal Revenue for the 1st Dist. of Cal., by delivering to, and leaving with John C. Lynch, as Collector of Internal Revenue for the 1st District of California. Said defendant named therein, personally, at the City and County of San Francisco in said District, a certified copy thereof,

together with a copy of the Complaint, attached thereto.

JOHN H. SHINE,
U. S. Marshal.
By Geo. H. Burnham,
Deputy.

San Francisco, May 19th, 190—.

[Endorsed]: Filed May 20th, 1905. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy, Clerk. [63]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee Under the Trust Declared by the Last Will of JOHN J. VALENTINE and EDWARD C. VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE, PHILIP C. VALENTINE, and J. J. VALENTINE, Jr., ETHEL STEIN VALENTINE and WILLIAM GEORGE VALENTINE,

Plaintiffs,

vs.

JOHN C. LYNCH, Collector of Internal Revenue for the First District of California,

Defendant.

General Demurrer.

Comes now the defendant in the above-entitled ac-

tion and demurs to the plaintiff's complaint upon the ground—

That said complaint does not state facts sufficient to constitute a cause of action;

Wherefore, defendant prays that said action be dismissed and for his costs.

ROBT. T. DEVLIN,
United States Attorney, Attorney for Defendant.

Due service of within Demurrer admitted on Feby. 17th, 1906.

MARSHALL WOODWORTH and
HELLER & POWERS,
Attys. for Plff.

[Endorsed]: Filed February 23, 1906. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy. [64]

At a stated term, to wit, the July term, A. D. 1908 of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 3d day of August, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,761.

UNION TRUST CO. OF S. F. et al.

vs.

JOHN C. LYNCH, Col., etc.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein

came on this day to be heard and by consent of George Clark, Esq., Assistant United States Attorney, it is ordered that said demurrer be and the same is hereby overruled, with leave to the defendant to answer within forty-five days. [65]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST CO. OF S. F.

vs.

JOHN C. LYNCH, Collector of Internal Revenue, etc.

Order of Substitution of Defendant.

It appearing that this suit was brought against John C. Lynch, as Collector of Internal Revenue for the First Collection District of California, and it further appearing that the subject matter of said suit relates to the official liability of said John C. Lynch, as such Collector of Internal Revenue, and it further appearing that after the filing of said suit the said John C. Lynch resigned on October 1st, 1907, as such Collector of Internal Revenue, and that his resignation was duly accepted to take effect on October 1st, 1907, and that August E. Muenter was appointed Collector of Internal Revenue in the place and stead of said John C. Lynch, and that said August E. Muenter duly qualified as such Collector of Internal Revenue on October 1st, 1907, and now is the duly appointed, qualified and acting Collector

of Internal Revenue for the First Collection District of California;

IT IS NOW HERE ORDERED, that August E. Muenter be substituted as defendant in the place and stead of John C. Lynch, and that said August E. Muenter be substituted as Collector of Internal Revenue, and that said suit be hereafter entitled and maintained against said August E. Muenter, as Collector of Internal Revenue.

WM. C. VAN FLEET,
Judge. [66]

[Endorsed]: Filed Sept. 14, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [67]

At a stated term, to wit, the July term, A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 14th day of September, in the year of our Lord one thousand nine hundred and eight. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,761.

UNION TRUST COMPANY, etc.

vs.

JOHN C. LYNCH, Collector, etc.

Order Substituting Defendant.

Upon motion of Marshall B. Woodworth, Esq., attorney for plaintiff, and it appearing to the Court

that John C. Lynch has been succeeded by August E. Muenter, as Collector of Internal Revenue, etc., and by consent of the United States Attorney; it is ordered that August E. Muenter, Esq., as Collector, etc., be and he is hereby substituted in the place and stead of John C. Lynch as defendant herein. [68]

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

No. 13,761.

UNION TRUST CO. OF SAN FRANCISCO,
Plaintiff,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,
Defendant.

Stipulation as to Certain Exhibits and Waiving Jury Trial.

It is hereby stipulated and agreed that the copy of the "Assessment List" of the First District of California, for the month of April, 1903, as certified to by the Collector of Internal Revenue for the First District of California, may be introduced in evidence as an exhibit in the case of Union Trust Co. of San Francisco vs. August E. Muenter etc., No. 13,761, and that the same general form of assessment was made in the following cases, numbered, respectively, No. 14,549, No. 14,555, No. 14,557, No. 14,568, No. 14,615, No. 14,623, No. 14,638, and No. 14,730; and it is hereby further stipulated and agreed that the ex-

hibits attached to the complaint in the case of Union Trust Co. of San Francisco, vs. August E. Muenter etc., No. 13,761, and the other exhibits introduced in that case for the purpose of illustrating the general forms used in the assessment and collection of taxes on legacies, may be used as exhibits in each of the following cases, to wit: No. 14,549, No. 14,555, No. 14,557, No. 14,568, No. 14,615, No. 14,623, No. 14,638; and No. 14,730; it is hereby further stipulated and agreed that a jury trial is hereby waived in writing by the respective parties and that the [69] above-entitled case, and cases, No. 14,549, No. 14,555, No. 14,557, No. 14,568, No. 14,615, No. 14,623, No. 14,638, and No. 14,730, may be tried by the Court without a jury, and that this stipulation may be entered *nunc pro tunc* as of November 20th, 1908;

It is further stipulated and agreed that the dates of the assessments by the Commissioner of Internal Revenue are, as testified to by J. M. Fletcher, as the same appears in his testimony, and are as follows:

Estate of	Date of Return on Forms 419 & 494.	Date of Assessment by the Commissioner.	List on Which Assessed.
John J. Valentine	April 30, 1903	May 16, 1903	April list, 1903
Sidney M. Smith	March 30, 1903	April 22, 1903	March list, 1903
Alexander McDonald	April 1, 1903	April 22, 1903	March list, 1903
Richard Hellman	April 29, 1903	May 16, 1903	April list, 1903
Robert R. Hind	May 6, 1903	June 17, 1903	May list, 1903
John Rosenfeld	June 29, 1903	July 20, 1903	June list, 1903
Caroline E. Cogswell	Dec. 16, 1903	Jany. 20, 1904	Dec. list, 1903
Wm. P. Morgan	June 20, 1904	August 8, 1904	June list, 1904
Geo. D. Bliss	Dec. 4, 1903	Jan. 20, 1904	Dec. list, 1903

This shall not be deemed a stipulation as to the character of the interests taxed.

Dated March 8, 1908.

ROBT. T. DEVLIN,
U. S. Atty. C.
MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

ORDER.

In pursuance of the above stipulation, it is hereby ordered that this stipulation be filed *nunc pro tunc* as of November 20th, 1908.

March 27, 1909.

WM. C. VAN FLEET,
U. S. Judge.

[Endorsed]: Filed Mch. 27, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [70]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee Under the Trust Declared by the Last Will of JOHN J. VALENTINE, and EDWARD C. VALENTINE, ETHEL STEIN VALENTINE, J. J. VALENTINE, WILLIAM GEORGE VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE, PHILIP C. VALENTINE,

Plaintiffs,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue for the First Collection District of California (Substituted for JOHN C. LYNCH, Formerly Such Collector),

Defendant.

Answer.

Comes now the defendant above named, and answering plaintiffs' complaint, denies and alleges as follows:

I.

Admits the allegations of paragraph I of said Complaint.

II.

Admits the allegations of paragraph II of said Complaint.

III.

Admits the allegations of paragraph III of said Complaint.

IV.

Admits that Philip C. Valentine will reach his majority May 7th, 1920.

This defendant denies that none of the said children has a vested interest in any portion of the said estate so left in trust. On the contrary, the defendant alleges that each of the said children is vested with the right to receive the income from said property and the right to receive the residue of the [71] said property when the youngest of said legatees shall have attained his or her majority.

Defendant further alleges that while the enjoyment of the *corpus* or residuary interest of the said trust funds is, under the terms of the will of said de-

ceased, deferred until the time last hereinbefore mentioned, yet the said legatees were vested in possession and enjoyment of the income of the said property and the right to receive such income for a certain period, to wit, until the youngest of the said legatees shall have attained the age of majority, and that each of the said legatees was also vested with the right to the future enjoyment of the property respectively bequeathed in trust.

V.

Defendant admits that the said tax has never been refunded.

VI.

Defendant is advised and believes, and therefore alleges, that certain of the legatees mentioned in the complaint did in fact receive legacies from the estate of the said John J. Valentine, deceased, which said legacies passed upon the death of the said deceased in immediate possession and enjoyment to such legatees, and that such legacies were of a clear value in excess of Ten Thousand (10,000) Dollars. That said legacies were received by the executor of the will of said deceased. That this defendant is unable to state particularly the exact amounts of these said legacies, for the reason that all information in regard thereto is possessed by the plaintiffs herein, and though often requested so to do, they have failed and each of them has failed to disclose to this defendant or to his predecessor in office the true nature and amount of such legacies.

That this defendant for the same reason, is unable to state the number of such legacies, or the particular

legatees receiving [72] the same. This defendant, however, asks that the plaintiffs in this case be compelled to make a full and complete disclosure in regard to the affairs of the estate of the said John J. Valentine, deceased, and as to the amounts of the legacies in fact bequeathed under the will of the said deceased and received by the said legatees, in order that if any judgment is granted to the plaintiffs herein, proper deductions may be made on account of any such legacies exceeding in value the sum of Ten Thousand (10,000) Dollars.

That the said legacies referred to in this paragraph were legacies derived from arising out of personal property belonging to the estate of said deceased, and passing under the will of said deceased and held in charge by the executor of said will upon the death of said deceased, and the admission of his will to probate.

Defendant further alleges that he has no possible means of ascertaining any of the facts other than those mentioned herein in regard to the said legacies referred to in this paragraph.

That no legacy tax of any kind has ever been levied or assessed upon the said legacies mentioned in this paragraph, excepting that the legacy tax mentioned in the complaint herein, has been levied, assessed and collected.

Wherefore, defendant prays that the plaintiff take nothing by this action, and for costs.

ROBT. T. DEVLIN,

United States Attorney, Attorney for Defendant.

[73]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

August E. Muenter, being first duly sworn, deposes and says: That he is the Collector of Internal Revenue for the First Collection District of California; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to such matters, that he believes it to be true.

AUG. E. MUENTER.

Subscribed and sworn to before me this 9th day of October, A. D. 1908.

[Seal] W. B. MALING,
Deputy Clerk U. S. Circuit Court, Northern District of California.

Service of the within Answer by copy admitted this 8th day of Oct., 1908.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy. [74]

At a stated term, to wit, the November term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Courtroom in the City and County of San Francisco, on Wednesday, the 7th day of December, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO et al.

vs.

AUGUST E. MUENTER, etc.

Order for Findings.

This cause came on this day for trial before the Court, sitting without a jury, Marshall B. Woodworth, Esq., appearing on behalf of the plaintiffs and George Clark, Esq., Assistant United States Attorney, appearing on behalf of the defendant. Evidence on behalf of the respective parties was introduced and closed and the cause was submitted to the Court for consideration and decision, and the same being fully considered, it was ordered that findings be filed and judgment entered herein in favor of plaintiffs for the sum of $1661.00, with interest thereon and for costs. [75]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO

vs.

AUGUST E. MUENTER, etc.

Findings of Fact and Conclusions of Law.

This cause having been tried by the Court without a jury, a jury having been waived, the Court, after due consideration, makes the following Findings of Fact and Conclusions of Law:

I.

That the plaintiff, Union Trust Company of San Francisco, was, at all of the times in the complaint alleged, and now is, the duly appointed, qualified, and acting trustee, under the trust declared by the last will and testament of John J. Valentine.

II.

That at all of the times in said complaint alleged, Edward C. Valentine, William George Valentine, Ethel Stein Valentine, Dudley B. Valentine, Eliza R. Valentine, Philip C. Valentine, and J. J. Valentine, Jr., were, and now are, the beneficiaries under the trust declared by the last will and testament of John J. Valentine, deceased.

III.

That John C. Lynch was the duly appointed, qualified and acting Collector of Internal Revenue for the

First Collection District of California, at all of the times mentioned in said complaint, and up to October 1, 1907, at and from which time, [76] August E. Muenter became the duly appointed, qualified, and acting Collector of Internal Revenue for the First Collection District of California, and ever since has been, and now is such Collector of Internal Revenue, and was duly and regularly substituted as party defendant in the place and stead of John C. Lynch.

IV.

That John J. Valentine died on or about December 21, 1901, in the County of Alameda, State of California, being a resident thereof at the time of his death and leaving property therein, and leaving a last will and testament, which was thereafter admitted to probate, in accordance with proceedings taken under the laws of the State of California, on or about December 30, 1901.

V.

That, according to the terms of said last will and testament, Union Trust Company of San Francisco was duly named and appointed the executor of said last will and testament of John J. Valentine, deceased.

VI.

That, on or about December 30, 1901, the said Superior Court duly made and entered its order admitting said last will and testament to probate and appointed said Union Trust Company of San Francisco executor thereof, which thereafter duly qualified and continued to act as executor until the close of the administration of said estate, to wit, on or

about March 11, 1903.

VII.

That after proceedings regularly had and taken in said probate proceedings, by an order and judgment of said Superior Court, duly given and made on March 11, 1903, the property of [77] said estate was, by final decree of distribution, distributed to Union Trust Company of San Francisco as trustee under the trust declared by the said last will and testament, and included in said property so distributed in trust to said Union Trust Company of San Francisco, as aforesaid, was personal property to be held in trust for the beneficiaries above named, and of the values set opposite their respective names viz.:

Edward C. Valentine, personal property of the value of	$17,502.91
William George Valentine	17,502.91
Ethel Stein Valentine	31,416.89
Dudley B. Valentine	21,761.40
Eliza R. Valentine	35,676.41
Philip C. Valentine	31,038.41
J. J. Valentine, Jr.	17,502.91

VIII.

That the above-named values of the personal property to be held in trust, and which were held in trust, for the above-named beneficiaries were the values as assessed on May 16, 1903, by said John C. Lynch, the then Collector of Internal Revenue.

IX.

That said personal property, to be held in trust for the above-named beneficiaries, of the values set opposite their respective names, as above stated, was to

be held, and is now being held under the terms of the last will and testament of said John J. Valentine, in trust, by said Union Trust Company of San Francisco, as such trustee, and the income thereon paid by said Union Trust Company of San Francisco to the said beneficiaries, until the youngest of said children and beneficiaries, Philip C. Valentine, shall have attained his majority.

X.

That Philip C. Valentine is the youngest of said children and beneficiaries, and will reach his majority on May 7, 1920, and not before. [78]

XI.

That said incomes derived from said legacies above named, of the values above set out, to be held in trust as aforesaid, do, not, nor does any one of them amount to the sum of $10,000 each year, or at all.

XII.

That on May 16, 1903, said John C. Lynch, the then Collector of Internal Revenue for the First Collection District of California, acting under and by virtue of the provisions of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, and the rules and regulations of the United States Internal Revenue Department in such cases made and provided, assessed the Union Trust Company of San Francisco, the plaintiff in this action, an Internal Revenue Tax, aggregating the sum of $1661.00, said tax being assessed upon the legacies distributed to said Union Trust Company of San Francisco, in trust as above stated, for the above-named beneficiaries as follows:

To the legacy of $17,502.91 in favor of Edward C. Valentine, a legacy tax of $131.27; to the legacy of $17,502.91, in favor of William George Valentine, a legacy tax of $131.27; to the legacy of $31,416.89, in favor of Ethel Stein Valentine, a legacy tax of $333.44; to the legacy of $21,761.40, in favor of Dudley B. Valentine, a legacy tax of $163.21; to the legacy of $35,676.41, in favor of Eliza R. Valentine, a legacy tax of $401.36; to the legacy of $31,038.41, in favor of Philip C. Valentine, a legacy tax of $349.18; to the legacy of $17,502.91, in favor of J. J. Valentine, Jr., the legacy tax of $131.27; said legacy taxes aggregating the sum total, as above stated, of $1661.00. [79]

XIII.

That on May 27, 1903, the Union Trust Company of San Francisco, paid to the then Collector of Internal Revenue for the first Collection District of California the sum of $1661.00, which sum was paid by the said Union Trust Company of San Francisco to the then Collector of Internal Revenue for and on behalf of the beneficiaries above named.

XIV.

That said assessment and payment of said tax of $1661.00 as aforesaid was made under protest.

XV.

That said John C. Lynch, the then Collector of Internal Revenue and said Commissioner of Internal Revenue and said August E. Muenter, the present defendant and successor in office of said John C. Lynch, have at all times refused to refund said sum of $1661.00, or any part thereof, and that the whole

and every part thereof is still remaining unpaid and unrefunded.

From which foregoing Findings of Facts, I deduce and make and enter the following conclusions of law:

I.

That the Union Trust Company of San Francisco is the proper party plaintiff and has the legal capacity to institute and maintain this action.

II.

That the personal property and legacies distributed under the terms of the last will and testament of John J. Valentine, deceased, to the Union Trust Company of San Francisco, in trust, and to be held in trust for the above-named beneficiaries, were, and each of them was, contingent beneficial interests, which did not vest absolutely in possession or enjoyment within the meaning of the Act of Congress of June 27, 1902, [80] prior to the repeal of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, which took effect on July 1, 1902.

III.

Said taxes, so assessed, imposed and paid as aforesaid upon the several legacies as aforesaid, were, and each of them is, illegal and erroneous, and each of them was erroneously and illegally assessed, imposed and collected without authority of law.

IV.

That the plaintiff recover judgment against the defendant, as Collector of Internal Revenue for the First Collection District of California, in the sum of $1661.00, being the aggregate amount of taxes

assessed, imposed and paid as aforesaid, with the interest on said sum at the rate of seven per cent per annum from May 27, 1903, the same being the date when said taxes were paid to the then Collector of Internal Revenue, and with interest from date of said judgment and costs of suit as taxed.

Dated this 18th of January, 1911.

WM. C. VAN FLEET,
Judge.

Approved.

GEO. CLARK,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [81]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee Under the Trust Declared by the Last Will of JOHN J. VALENTINE, and EDWARD C. VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE, PHILIP C. VALENTINE and J. J. VALENTINE, Jr., ETHEL STEIN VALENTINE and WILLIAM GEORGE VALENTINE,

Plaintiffs,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue for the First District of California, Defendant.

Judgment on Findings.

This cause having come on regularly for trial upon the 7th day of December, 1910, being a day in the November, 1910, Term of said court, before the Court, sitting without a jury, a trial by jury having been duly waived by stipulation filed, Marshall B. Woodworth, Esq., having appeared as attorney for plaintiffs, and George Clark, Esq., Assistant United States Attorney, having appeared as attorney for the defendant, and the trial having been proceeded with upon the 7th day of December in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced, and the evidence having been closed, and the cause having after arguments by the attorneys for the respective parties been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance therewith and for costs;

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Union Trust Company of San Francisco (a Corporation), as trustee under [82] the trust declared by the Last Will of John J. Valentine, and Edward C. Valentine, Dudley B. Valentine, Eliza R. Valentine, Philip C. Valentine, and J. J. Valentine, Jr., Ethel Stein Valentine and William George Valentine, plaintiffs, do have and recover of and from

August E. Muenter, as Collector of Internal Revenue for the First District of California, defendant, the sum of Two Thousand Five Hundred Forty-nine and 49/100 ($2549.49) Dollars, together with their costs in this behalf expended, taxed at $———.

Judgment entered January 18, 1911.

SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

A True Copy. Attest:
[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [83]

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 13,761.

UNION TRUST CO. OF S. F. (a Corporation), etc. et al.

vs.

AUGUST E. MUENTER, etc.

Certificate to Judgment-Roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify

that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled matter.

Attest my hand and the seal of said Circuit Court this 18th day of January, 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [84]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,615.

LOUIS ROSENFELD et al.

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,567.

ELEANOR CAMPBELL O'KELLY

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,796.

ALFRED FRIEDRICH et al.

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,730.

GEORGE D. BLISS, Jr.

vs.

AUGUST E. MUENTER, as Collector, etc.

Consolidated Bill of Exceptions.

A trial of the above-entitled causes was begun on November 20th, 1908, before the Court sitting without a jury, a jury having been expressly waived in writing by the plaintiffs and the defendant.

Marshall B. Woodworth, Esq., appeared as attorney for the plaintiffs, and Robt. T. Devlin, United States Attorney, appeared as attorney for the defendant.

By stipulation of the parties it was agreed that all the [85] said causes should be consolidated for the purpose of trial and that all the testimony taken other than that relating especially and particularly to a given cause of action should be deemed taken in support of or in defense of all of the various causes of action.

The trial of the said causes was concluded on the 7th day of December, 1910; at the conclusion of the trial the Court rendered judgment in favor of the plaintiffs for the amounts hereinafter shown.

At the trial of the said causes the following proceedings were had:

Mr. WOODWORTH.—If your Honor please, these are civil actions which are brought by executors of estates for the purpose of recovering from the Government taxes which were paid under the Spanish American war tax law, and paid unlawfully, as claimed by us.

(Mr. Woodworth here made a statement of the issues involved in the cases and referred to and explained the pleadings in the case of Union Trust Company vs. August E. Muenter, No. 13,761.)

Mr. CLARK.—Mr. Woodworth is right in saying that the Government desires proof with reference to the quantity of the estate which was received by these legatees. Before we had commenced this case, your Honor has recently ruled in construing a will very much similar to this, and rendering a decision in the case of Lynch vs. The Union Trust Company on appeal, that where a legatee is left nothing but the income from a trust estate, the *corpus* of the trust or of the fund to pass at some time in future, providing he lives that long, the legacy is contingent and does not pass into possession and enjoyment so it [86] can be taxed by the war revenue act of 1898. I maintain that it is purely a question of law. What we want counsel to show in this case, so as to protect the interest of the Government, is that the income or the amount received prior to the repeal of this Act by these legatees, any one of these legatees, was not the sum of $10,000. Now, the other point goes to every one of these cases, that is, the point with relation to the date of death of John J. Valentine, who died within a year prior to July 1st,

1902; under the defense of counsel, and under some decisions, that being true, they would be entitled to recover here, providing the taxes were in each instance paid under protest but we want proof from counsel upon that fact in each instance.

The COURT.—You want the date of the death, the payment of the taxes under protest, and the amount of the income.

Mr. CLARK.—We concede the date of the death in every instance; we concede in every instance that the decedent died within a year prior to July 1st, 1902, the date of the repeal of the Act. What we want is proof from counsel that the moneys were paid under protest in these cases, and I want proof from counsel that there was not $10,000 that passed prior to the date of the repeal of the Act by way of income, or by way of actual payment over to the legatee.

The COURT.—You mean prior to the date the repeal of the Act took effect.

Mr. CLARK.—Yes.

The COURT.—It could not have been paid prior to the repeal of the Act where all these parties died between the date of the repealing of the Act and the date it took effect.

Mr. CLARK.—We desire proof from counsel on the fact that the parties now suing have a right to sue, and while that seems [87] technical, I will say that since filing the Answer raising the point in this case, it was necessary for counsel to file new pleadings or new suits so as to bring in the proper parties plaintiff. Do you desire to go ahead with

that particular suit in which you filed the new pleadings? Do you desire to go ahead with the new suit which you filed?

Mr. WOODWORTH.—Yes.

Mr. CLARK.—It is stipulated that a general denial will be filed in that suit.

Mr. WOODWORTH.—Yes.

The COURT.—You can proceed now with any cases that you wish to take up.

Mr. WOODWORTH.—I am ready to proceed with the Union Trust Company case. I might state to your Honor that there is attached to the Complaint in the Union Trust Company of San Francisco against August Muenter a copy of the will, a certified copy, or a copy of a certified copy of the final decree of distributions, and a copy of what is known in the internal revenue regulations as form 490, which is the notice given by the executor to the Collector of Internal Revenue of the legacy.

The COURT.—Notice of what?

Mr. WOODWORTH.—It is the notice which the executor of the estate makes to the Collector. That is a matter required by the internal revenue rules.

The COURT.—That statement is the basis for the taxes.

Mr. WOODWORTH.—It is a statement of the legacies and distributive shares.

Mr. CLARK.—What exhibit is the notice that you refer to now, Mr. Woodworth?

Mr. WOODWORTH.—That is Exhibit No. 3. Then the legacy is Exhibit No. 4 as attached to the Complaint? [88]

Mr. CLARK.—I think Exhibit 4 is a copy of the will.

Mr. WOODWORTH.—It is marked Exhibit 4 here. The schedule attached to the Complaint, form No. 445, which is notice of the demand for the payment of the legacy by the Collector of Internal Revenue, the receipt for the payment of the taxes, which is attached to the Complaint. The written protest that was made at the time of payment, which is Exhibit No. 8, is attached to the Complaint, and the claim for refunding, upon form 456, is also attached to the Complaint.

The COURT.—Are those originals?

Mr. WOODWORTH.—Those are all copies, if your Honor please.

THE COURT.—Are you suggesting that they now go into the record?

Mr. WOODWORTH.—Yes, for the purpose of having the proof in a regular way.

The COURT.—Are you offering them in evidence? They are merely copies.

Mr. CLARK.—We have stipulated, if your Honor please, that they are correct.

The COURT.—There is no necessity of reading them into the record; they are all part of the pleadings, and that is a part of the record already.

[Testimony of D. L. Clarke, for Plaintiff.]

D. L. CLARKE, called as a witness for plaintiff, after being sworn, testified:

That he was the trust officer of the Union Trust Company of San Francisco, and had been for two and a half years and that he was acquainted with

(Testimony of D. L. Clarke.)

all of the matters in the estate of John J. Valentine of which the said Union Trust Company was the executor and of which it has been the trustee; that he was familiar [89] with the accounts of the estate from the inception of the administration thereof; that no income had been paid to any of the following named persons, Edward C. Valentine, Ethel S. Valentine, John J. Valentine, Jr., William G. Valentine, D. B. Valentine, Eliza B. Valentine and Philip Valentine, up to July 1st, 1902, and that no income under the provisions of the will of the deceased Valentine had accrued to any of the said persons up to July 1st, 1902, and that in fact no income accrued to any of the said named persons until some time after March 11th, 1903, the date of the decree of final distribution in the Estate of Valentine.

On cross-examination the witness stated that prior to the decree of final distribution in the Estate of Valentine the legatees named in the will received nothing whatever, the whole estate being distributed to the Union Trust Company of San Francisco, as trustee, that he was unable to state what income from the estate had accumulated during its administration and prior to final distribution; that roughly about three hundred thousand dollars worth of property was distributed to the legatees in trust under the terms of the will of Valentine; that the testator died on December 21st, 1901; that prior to July 1st, 1902, the income upon the trust estate was not sufficient, if divided in accordance with the terms

(Testimony of D. L. Clarke.)

of the will to amount in the case of any legatee to as much as ten thousand dollars, that is, each beneficiary, had the income been divided, would certainly have received less than ten thousand dollars; that he might be able to figure out just what the total of the income, prior to July 1st, 1902, would in fact be; that there was certain insurance money that went into the estate, but that this belonged to the surviving wife. [90]

After having been given an opportunity to make an estimate for the purpose of arriving at the income derived from the estate, the witness further testified on cross-examination: That the total value of the estate was made by considering both the real property and the personal property and that the value of the personal estate which went into the trust was $170,914; that $15,000 in life insurance went into the trust; the total value of all the personal property in the estate amounted to $375,000; in addition there was real estate of the value of about $50,000; only $170,000 went into the trust because of many other specific legacies than those given to the children, because of the large family allowance, executors' commissions, heavy expenses of administration and the many claims which it was necessary to pay; that he was positive no more than one hundred and seventy thousand dollars was left to be turned into the trust fund and that no sum other than the one hundred and seventy thousand dollars or personal property of that value was ever distributed for the benefit of the legatees who were the

(Testimony of D. L Clark.)

children of Valentine, deceased; that such cash as could be called income from this distributed property up to July 1st, 1902, did not exceed $10,959, and that such sum was the entire gross income upon not only the personal property which was distributed in trust but also real property which was distributed; that he had estimated the income from the time of the death until said July 1st, 1902.

On redirect examination the witness stated that no sum amounting to $10,000 had ever been paid to any of the persons named in the complaint from the death of the deceased to July 1st, 1902 or at any other time; that nothing had been paid up to April, 1902, the time of distribution and that there had not become due, up to July 1st, 1902, to any of the legatees of Valentine [91] from his estate, the sum of $10,000.

On the resumption of the trial of the case of Union Trust Company vs. Muenter, No. 13,761, on the 7th day of December, 1910, further proceedings occurred as follows:

Mr. WOODWORTH.—The complaint in this case is made by the Union Trust Company of San Francisco as trustee under the trust declared by the last will of John J. Valentine and a number of other parties. The amount sued for is the sum of $1,661. Mr. Clark in his answer admits the incorporation of the Union Trust Company of San Francisco and the capacity of the plaintiff to sue, in that he concedes that it was and now is a trustee under the

trust declared by the last will and testament of John J. Valentine. He concedes that the defendant was Collector of Internal Revenue at that time; he concedes that John J. Valentine died in the county of Alameda, State of California, on or about the 21st day of December, 1901, and that a copy of the will annexed to this complaint and marked Exhibit 1 is a copy of the will; he concedes that after proceedings taken in the regular manner the property was distributed to the Union Trust Company of San Francisco as trustee under the trust declared by the will of the deceased; and he concedes, among other things, that "said personal property to be held, and is now being held, in trust by said Union Trust Company of San Francisco as such trustee, and the income thereon paid by said Union Trust Company of San Francisco to the said beneficiaries, until the youngest of said children (said Philip C. Valentine) shall have attained his majority, (a copy of which said decree is hereto attached, marked Exhibit 2)."

Now, it is claimed in paragraph 4 of the complaint that Philip C. Valentine is the youngest of said children and will [92] reach his majority on the 7th day of May, 1920, and not before.

That none of the said children and beneficiaries hereinabove mentioned have any vested interest whatsoever in any portion of said estate, save and except the income thereon.

That said income in each instance is of so small amount that the annuity value thereof, under the rules of the Internal Revenue Department, for the purpose of assessing taxes on legacies, is much less

than $10,000.00, and is, in fact, in the neighborhood of $1,000.

With reference to that allegation, Mr. Clark in his answer contends that the legacies had become vested. That raises purely a question of law which your Honor, upon examining the will, will find is controlled by your Honor's decision in the Follis case; it is exactly the same question; and also by the Supreme Court of the United States in the case of Vanderbilt vs. Eidman and also in the Hertz case.

Mr. Clark admits that the proper steps were taken in filing a claim before the Collector of Internal Revenue, and thereafter taking an appeal to the Commissioner of Internal Revenue. He admits the payment of the tax to the Government; admits that the assessment was made as alleged in the complaint, and concedes that the money is still due, owing and unpaid. Am I correct in those allegations?

Mr. CLARK.—Yes, the allegations of the complaint and answer.

Mr. WOODWORTH.—As your Honor can see, there is only one question raised by Mr. Clark in that case, and that matter can be disposed of very quickly, so far as the proofs are concerned, and the law.

The COURT.—Just the character of the legacy.

[93]

Mr. WOODWORTH.—Was it vested or was it not?

Mr. CLARK.—You further admit that the value did not exceed $10,000—

Mr. CLARK.—As I recall the point in that case, it was as to whether the proper parties are plaintiff.

Mr. WOODWORTH.--You admit that in your answer.

Mr. CLARK.—Do I admit in the answer they are the proper parties?

Mr. WOODWORTH.—Yes. I will read from your brief which is filed here—it seems to me a very technical point is raised. The Union Trust Company was appointed trustee, which you have admitted. It has paid this tax, it is the holder of this property for these children; it will hold this property until 1920, and it is the proper party to sue.

Mr. CLARK.—The tax was paid after the decree of distribution, the distribution to the Union Trust Company.

Mr. WOODWORTH.—Yes.

Mr. CLARK.—I think in that case the plaintiff should recover. I think that the fact that the tax was paid after the entry of the decree of distribution—the decree of distribution did contain an omnibus clause whereby the estate was distributed—all of the undescribed portion of the estate was distributed, two-third to the Union Trust Company, and one-third to the widow of the deceased. However, the trustees who are suing here did in fact pay the tax after the entry of the decree of distribution, and as they made the payment—

The COURT.—That would come within the rule—

Mr. CLARK.—That would remove it from any doubt as to whether the decree of distribution would cover this particular claim. I think in that case the plaintiff should recover. [94]

The COURT.—Let judgment in that case go for the plaintiff.

Mr. WOODWORTH.—The next case, if your Honor please, which was also before your Honor at a previous hearing, is the case of Louis Rosenfeld and Henry Rosenfeld, as trustees under the last will and testament of John Rosenfeld against August E. Muenter, and is numbered 14,615. That is a case precisely on all fours with the case of Union Trust Company vs. Muenter, just decided by your Honor, and in that case, if your Honor please, the admissions made by the pleadings are as follows: The answer admits that the defendant August E. Muenter is now and has been since the 1st day of October, 1907—

The COURT.—You do not need to state those things.

Mr. WOODWORTH.—I will now proceed to the important matters. The answer admits the death of John Rosenfeld on May 28, 1902, in the city of New York; it admits that according to the terms of his last will and testament Louis Rosenfeld and Henry Rosenfeld were duly named and appointed the executors of the last will and testament of John Rosenfeld.

That on or about June 15, 1902, letters testamentary of the said will were duly issued and granted to the said Louis Rosenfeld and Henry Rosenfeld by the Superior Court of the State of California, in and for the City and County of San Francisco. The answer admits the death of the decedent; it admits the fact that he left personal property; it admits the

imposition of this tax; it admits the payment of the tax; it admits the filing of a claim and also concedes a protest. The question raised by Mr. Clark is—he did not admit the capacity of the plaintiffs to [95] sue, to bring this suit. Mr. Clark was very fair in the case; he said that if the testimony should disclose that the trustees paid this tax that there should be a recovery against the Government. Now, the fact is, we take it, and I shall refer your Honor to the testimony taken at the previous hearing, on page 59 Mr. Henry Rosenfeld testified as follows (reading:) Beginning on page 59,—

"Q. Do you recall paying this legacy tax to the Government? A. Yes, sir.

"Q. Will you kindly state to his Honor just the circumstances under which you paid the tax. When were you first notified of the demand of the Government for this tax. Was it before July 1, 1902?

"A. It was July, 1903.

"Q. Almost a year afterward. What were the circumstances attending the demand and your eventually paying it?

"A. There was a demand made for the payment of the tax and I called on our attorney and asked him in relation to it." That is not just what I want.

The COURT.—Is there any question that the trustee paid the tax?

Mr. CLARK.—I think, your Honor, the trustee did pay that tax. I think the decree of distribution was entered before the payment; that is my recollection of it.

Mr. WOODWORTH.—On July 13, 1903, the prop-

erty was distributed to the trustees, and the tax was not paid until afterwards.

Mr. CLARK.—Do you sue in the capacity here as trustee?

Mr. WOODWORTH.—As trustee.

Mr. CLARK.—Let me see your complaint.

Mr. WOODWORTH.—On the 29th of July, 1902, and the decree [96] was on July 13, 1903—subsequent to the decree.

Mr. CLARK.—I think, your Honor, the case is in the same state as the case of Union Trust Company vs. Muenter. Have you the will, Mr. Woodworth?

Mr. WOODWORTH.—I think the will is attached to the legacy return.

Mr. CLARK.—No, the wills are not here. Here is a copy of the will.

The COURT.—What is the provision of the will?

Mr. CLARK.—If the Court please, I am not going into Mr. Woodworth's case, but it seems to me that some of the provisions in this will do specifically bequeath the legacies which are of value over $10,000, for instance, the second provision of the will, the amount not being left in trust at all, and of course so far as this tax was imposed that would be—so far as this tax was imposed upon a legacy which passed in trust to these trustees, the Government, under the ruling of the Circuit Court of Appeals of this Circuit would necessarily admit judgment would have to go against it; so far as that tax was imposed upon legacies which passed directly—and the clause of that will does contain a legacy which did pass

directly, and which amounted to $10,000, why of course we would say there should be no recovery, because there is a clear, plain specific legacy. Now, I do not know what—

The COURT.—Should be no recovery?

Mr. CLARK.—Should be a recovery.

The COURT.—Then the case comes within the ruling in Union Trust Company vs. Muenter.

Mr. WOODWORTH.—Just exactly the same thing.

Mr. CLARK.—This tax was imposed upon—[97]

Mr. WOODWORTH.—The trust. Is that satisfactory?

Mr. CLARK.—I want to see if it was a tax imposed upon the trust estate.

Mr. WOODWORTH.—It was.

Mr. CLARK.—The amount involved in this case is over $4,000. There is a series of legacies, at least six, which were taxed. Before consenting that the judgment should go against the Government in that case, I would prefer, inasmuch as counsel cannot specify exactly the provisions of the will, to look the matter over—before making any concession in regard to that.

Mr. WOODWORTH.—I can call his Honor's attention to it now. It is a very plain matter.

The COURT.—Proceed and put in your case.

Mr. WOODWORTH.—That will provides as follows: (Reads will.)

Mr. CLARK.—Have you read the entire will?

Mr. WOODWORTH.—I have read all of the will.

Mr. CLARK.—The return shows on its face that this sister's legacy was taxed.

Mr. WOODWORTH.—That was not; under the law it could not be taxed.

Mr. CLARK.—The return shows that the legacy was taxed in the sum of $150, that particular legacy.

Mr. WOODWORTH.—That is true, if your Honor please.

Mr. CLARK.—Of course, the amount involved in this case is considerable, and I do not want to be put in the attitude of consenting to it; it would seem to me that your Honor could make a judgment that the plaintiff recover the tax imposed in so far as it was imposed upon the trust estate as shown by the exhibits. Then as a matter of calculation that can be determined.

Mr. WOODWORTH.—The amount of $150; I am so anxious to dispose [98] of these matters I will not make any point on that, because of the small amount. But on some of the other cases I should like to be heard on the matter. I am perfectly willing to take a judgment for $4062.90, less $150. What is that amount? Is that satisfactory?

Mr. CLARK.—I do not want to be put in the position of consenting to a judgment of that sort. I will say in that case that it appears to be a case coming within the rule of Union Trust Company vs. Muenter.

The COURT.—Mr. Clark, I want to know the facts, whatever they are.

Mr. WOODWORTH.—You have conceded that in your brief.

Mr. CLARK.—Just a moment. I will look at it and see. I was in error, your Honor, in the brief in consenting to a judgment for the entire amount. Of course the $150 deduction—

Mr. WOODWORTH.—I do not make any point on that.

The COURT.—Let judgment in the case go for the plaintiff, less the $150.

Mr. CLARK.—Of course, it might be that some different position would be taken with respect to the question as to whether these legacies are or are not contingent, and so I would just like to be in this position with respect to these matters, simply state what the facts are and saying that within the rule the judgment would have to go in that way, so as not to be put in the attitude of having consented, because we may possibly get some instructions to take an appeal in these cases.

[Testimony of John Rosenfeld, for Plaintiff.]

In support of the Plaintiff's case No. 14,615, entitled Louis Rosenfeld et al. Plaintiffs, vs. A. E. Muenter, JOHN ROSENFELD, called for plaintiff, on being sworn, testified: That he was the son of John Rosenfeld, whose estate is involved in this case, and that the said John Rosenfeld died May 20th, 1902, and that [99] he and his brother Henry Rosenfeld were appointed executors of the will of deceased; that they remained such executors until July 13th, 1903, on which said date the property of the estate was distributed to them as trustees in accordance with the terms of the will of the deceased; that at no time did any of the heirs of the deceased or the

(Testimony of John Rosenfeld.)

legatees named in the will receive any of the *corpus* of the estate, and that under the terms of the will no one is to receive any of the *corpus* of the estate until 1913; that at the present time he and his brother were, as trustees, holding all of the property of the estate under the trust clause of the will, and that up to the present time he had received nothing from the estate nor had his brother; and that the only amounts received by any of the legatees or heirs were stipulated sums per month; that the amount received by each one of the heirs and legatees did not amount to $10,000 to each one a year; that he recalled the payment of the legacy tax to the Government; that it was not until July, 1903, that any tax notice was given by the Government that it demanded any tax; that his attorneys informed him that the act had been repealed and there was no obligation to pay any tax; that he called at the Internal Revenue office, and that he was told that if the tax was not paid a penalty would be exacted, whereupon his attorneys advised that the tax be paid; that the Internal Revenue officers had advised him that if the tax was not paid, a suit would be begun and a penalty collected; that he protested against the payment of the tax after the demand was made and that under the advice of his attorneys when the tax was paid, he protested against the payment; that his protest was oral; that it was made on July 29th, 1903.

Cross-examination.

On his cross-examination the witness testified:

[100] That the tax in this case was paid after the

decree of distribution in the estate had been made and after the trustees had received the property; that the amount of the tax was $4062.90.

On the resumption of the trial of the case of Louis Rosenfeld et al. vs. Muenter, No. 14,615, on the 7th day of December, 1910, further proceedings occurred as follows:

It was stated to the Court by the United States Attorney that the testimony did disclose that the tax had been paid by the trustees who were maintaining the action, and that apparently the tax had been imposed upon the property subject to provisions of a will similar to those involved in the case of Union Trust Company vs. Lynch, which had been decided by the Circuit Court of Appeals for the Ninth Circuit, and that consequently it would be incumbent upon the Court to grant judgment to the plaintiff in so far as the case at bar was governed by the case of the Union Trust Company vs. Lynch determined by the Circuit Court of Appeals, but that of the total amount sued for in the case, One Hundred and Fifty Dollars had been levied upon a legacy which had passed directly and that no recovery should be had for this amount. The Court stated that the judgment of the Court would be in favor of the plaintiff for the principal amount involved, less the sum of One Hundred and Fifty Dollars, together with lawful interest.

A copy of the will of the deceased was admitted in evidence, the same being attached to the claim for refunding of taxes next herein mentioned.

A copy of the legacy return and schedules returned

by the estate of the deceased Rosenfeld to the Collector of Internal Revenue was here received in evidence, the same being marked Plaintiff's Exhibit One and in case No. 14,615. [101]

In the case of O'Kelly vs. Muenter, No. 14,567, the following proceedings were had:

Mr. WOODWORTH.—The next case is that of Eleanor Campbell O'Kelly vs. August E. Muenter, No, 14,567. The amount sued for in this case is $1341.09. The complaint is of the same general character, and the answer of the same nature.

The COURT.—What is the point raised?

Mr. WOODWORTH.—The point raised here is as to the legal capacity of the plaintiff to sue. That is, Mr. Clark wants to be satisfied that she still is at the present moment the executrix of the estate. Since the death of her husband this lady has remarried, and I introduce a certified copy of the marriage certificate, license certificate, also a certified copy of the letters testamentary brought down to date, that is, until the other day, until the first of December, 1910, and will offer these in evidence and ask that they be marked Exhibits 1 and 2, respectively, on behalf of the plaintiff; therefore, as far as the Court is concerned, she still remains the executrix and is competent to maintain this action. Now, this is a case similar to the Union Trust Company and the Rosenfeld case, if your Honor please. The protest in this case is admitted, is it not?

Mr. CLARK.—Yes, it is. Mr. Thomas testified to all of these specific instances, that they were paid under protest.

Mr. WOODWORTH.—I now offer the legacy return and the schedules annexed thereto in evidence, with a copy of the will also annexed. I ask that they be marked respectively Exhibits 3, 4 and 5, on behalf of the plaintiff.

This case, if your Honor please, is exactly similar to the Union Trust Company case, and I will read so much of the will as will be necessary for the purpose of showing that. [102]

(Reads from will.) There is a further proposition in this case, that there is a contest of this will which is still pending; but at any rate this case comes within the Union Trust Company case and the Rosenfeld case.

The COURT.—What is the amount involved there.

Mr. WOODWORTH.—$1,341.09. She is still the executrix of the estate and there has been no decree of distribution at all.

Mr. CLARK.—You rely particularly on items three and four. (Reading.) The will is extremely long, your Honor, and I have gone through it hurriedly, and I think that is the provision creating the trust and subjecting the property to control of the mother, and it would seem that the will does come within the rule laid down in the case of Union Trust Company vs. Lynch, and that in this case judgment would go for the plaintiff. There has been no decree of final distribution in this case?

Mr. WOODWORTH.—Not up to that time.

The COURT.—Let judgment go for the plaintiff.

In this case the will of the deceased was admitted in evidence and marked Plaintiff's Exhibit 3 in case

No. 14,567. Said will is attached to the legacy return and schedule next mentioned, being separately marked.

Said legacy return and schedules, so received in evidence are marked Plaintiff's Exhibits 4 and 5 in case No. 14,567.

In the case of Friederich vs. Muenter, No. 14,796, the following proceedings were had: [103]

Mr. WOODWORTH.—The next case is No. 14,-796, a case brought by Alfred Friederich, Beatrice Jefferis, nee Friederich, Marguerite Roberts, nee Friederich and Mizpah Hoelscher, nee Friederich, against August E. Muenter, Collector of Internal Revenue. This is a case that has not been tried, and involves exactly the same questions. It is a simple case, and I wish to get rid of it. This is a suit brought by these four parties who were the heirs at law of Gustav A. Friederich, who died on January 19, 1902. In that case, Mr. Clark filed the general answer. I suppose, Mr. Clark, it will be admitted, for the purpose of this case, that the tax was paid as alleged?

Mr. CLARK.—Yes, assessed as alleged.

Mr. WOODWORTH.—And a claim presented for its refund, and the money is still due, owing and unpaid.

Mr. CLARK.—The money is unpaid.

Mr. WOODWORTH.—I now offer in evidence the original legacy returns of the Internal Revenue Office and the schedules annexed thereto, to which is also annexed a copy of the will of Gustav A. Friederich, and some other papers, such as Duplicate

Statements of Facts Presented and Allowed. Will you mark those now?

(The papers are marked Exhibits 1, 2 and 3 on behalf of plaintiff.)

We have a witness here, if your Honor please, Mr. Hoelscher.

The COURT.—What do you want to prove by him?

Mr. WOODWORTH.—Simply to show that under the terms of this will the legacy shares could not be paid over owing to the trust clauses, until the youngest sister arrived at age.

The COURT.—That depends upon the terms of the will. That is not a matter of oral proof. [104]

Mr. WOODWORTH.—I know, but there is a further provision. During the dependency of this trust clause a certain income was to be paid to these people, and I desire to show, unless you admit it, Mr. Clark, that the income does not amount to $10,000. The youngest child did not reach the age of twenty-one until the twenty-second day of August, 1904, which was, of course, subsequent to the repeal of the law, and was not vested at the time of the repeal of the law. There has been a decree of distribution, Mr. Clark, dated August 17, 1904.

Mr. CLARK.—During the progress of the trust?

Mr. WOODWORTH.—From the trustees to the heirs who are now suing, less the amount of the legacy there.

Mr. CLARK.—I would like to have the witness sworn.

[Testimony of William F. Hoelscher, for Plaintiff.]

WILLIAM F. HOELSCHER, being sworn, testified for the plaintiff, as follows:

That he was the husband of the oldest daughter of Gustav Friederich, deceased; that he knew there was no distribution in the estate of the deceased before 1904 of any kind. The legatees and heirs of the deceased did not nor did any of them receive anything until the youngest child became twenty-one years of age and that was on August 2d, 1904; fifteen days later the estate was distributed less the amount of the income tax; the executors were called upon to pay the income tax. The action is prosecuted by the heirs themselves in this case; the executors were discharged; the trustees have been discharged from their trust.

(Mr. Woodworth here stated that he had never been able to procure a copy of the decree of distribution in the estate. Mr. Woodworth further stated that the legatees were entitled to the claim against the Government because the same had been paid **[105]** out of their shares. They got their legacies less the amount of the tax and they are the parties that have been injured.)

The COURT.—At the time that it was paid it was a part of the estate. Now, then, if this is recoverable it is recoverable by the executors.

Mr. WOODWORTH.—He is no longer in existence. The estate has been finally distributed to those who were entitled to it, and they have received their legacy shares less the amount of the tax.

(Testimony of William F. Hoelscher.)

The COURT.—The witness says that the decree of distribution which has been destroyed in the fire did not distribute this claim to the heirs, that that was retained in the hands of the executors.

The WITNESS.—It was deducted, I understand. It was deducted from each share.

Mr. CLARK.—Do you know when it was that the executors were discharged?

A. They must have been discharged about August 2d, 1904.

Q. August 2d, 1904?

A. Yes, that was the time when the youngest child became twenty-one years of age.

Q. But the legacy tax was paid before that time?

A. The legacy tax was paid on or about that time.

Q. It came out of their share, did it? A. Yes.

Q. Was it distributed to the trustees or to the legatees?

A. At the time of the distribution, do you mean?

Q. At the time of the discharge of the executors, I mean.

A. Well, it was distributed to the legatees, each one received his portion less the income tax.

Mr. CLARK.—Can't you give the date, Mr. Woodworth, on which the distribution occurred in this estate?

Mr. WOODWORTH.—August 15th, 1904. [106]

Mr. CLARK.—Q. There never was any appointment of trustees in this case, was there?

A. No appointment. They were the trustees, those two parties, to proceed under the will.

(Testimony of William F. Hoelscher.)

The COURT.—Q. They were the executors and trustees both? A. Yes.

Mr. CLARK.—Do you know, Mr. Woodworth, whether the decree of distribution in this case did distribute either by general terms or specific terms the claim in suit to these present beneficiaries who are maintaining this action in their individual capacity?

Mr. WOODWORTH.—All I know is there was a final decree of distribution; the executor was discharged from his trust. This money was paid out of their shares, and certainly they have been injured by it.

The COURT.—It is not a question of injury. It is a question of whether they hold the legal title to sue for this amount.

Mr. WOODWORTH.—I think they do, under the circumstances. The statute provides it must come out of the shares, and it was taken out of their shares.

Mr. CLARK.—Do you think you could get a copy of that decree of final distribution?

A. I am afraid the copies were burned up in the Hall of Records.

Q. Who was your attorney at that time?

A. Mr. Friedenrich.

Mr. WOODWORTH.—We will have Mr. Friedenrich here in the morning so as to satisfy you, Mr. Clark.

[Testimony of David Friedenrich, for Plaintiff.]

DAVID FRIEDENRICH, called for the plaintiff, sworn, testified:

Mr. WOODWORTH.—Q. Mr. Friedenrich, you are an attorney and practicing lawyer, and have been for many years? A. Yes, sir. [107]

Q. Were you the attorney for the executors in the case of Gustav A. Friedrich? A. Yes, sir.

Q. Could you tell the Court—I will ask you, first, have you any of the papers? A. No, sir.

Q. What became of the papers that were filed, the probate papers?

A. They were all destroyed by the fire, but since you spoke to me about the matter, last evening, I looked over my private papers and I found one paper which somewhat refreshed my memory as to certain facts.

Q. You did not find a copy of the final decree of distribution did you? A. No, sir.

Q. Will you kindly state to the Court whether in the decree of final distribution which was filed in this estate there was any clause transferring all unknown and undiscovered property, an *omnibus* clause?

A. Well, I have no distinct recollection of the terms of this decree, but I always took a special care in every decree of final distribution to have the *omnibus* clause inserted.

The COURT.—Q. But you have no distinct recollection of this?

A. No distinct recollection of this decree, but in conformity with my universal rule, I have not any

(Testimony of David Friedenrich.)

doubt that that *omnibus* clause was inserted.

Q. It was an estate of considerable importance?

A. Yes, there was a good deal of money involved in the estate.

Mr. CLARK.—Do you remember distinctly in this case as to when the tax in question was paid to the Collector of Internal Revenue? A. No, sir.

Q. You do not remember that? A. No, sir.

Q. Do you remember whether it was paid before or after distribution?

A. It was paid after distribution. I think it was [108] paid by the trustees, because I remember being consulted by them.

Q. Do you remember quite distinctly being consulted by the trustees with respect to this payment of the tax? A. Yes, sir.

Q. It concerned the payment and not the mere collection of the tax that had already been paid—they did consult you, did they?

A. It referred to the payment of the tax.

Q. The actual payment?

A. Yes, sir. It is my recollection; in fact one paper that I have in my possession shows that the decree was entered January 13, 1903, and it was subsequent to that time that the trustees to whom the property had been distributed made distribution to the heirs, and it was during the time that—it was after the decree and before the distribution to the heirs that the tax was paid.

Mr. WOODWORTH.—And this tax came out of the various legacies which were paid? A. Yes, sir.

(Testimony of David Friedenrich.)

Mr. WOODWORTH.—That is all. I have nothing further, Mr. Clark.

Mr. CLARK.—I think that covers the facts.

Mr. WOODWORTH.—I will ask for judgment in that case, $432.88 with interest and costs.

The COURT.—What was the question we were discussing yesterday?

Mr. CLARK.—As to the actual payment of the tax after the decree of distribution, the question being as to whether if paid before, the claim against the Government had been covered by the decree of distribution.

The COURT.—Let judgment go for the plaintiff. [109]

Plaintiff offered in evidence the will of the deceased which was marked Exhibit 1 in case No. 14,796, the same being a part of Exhibits 3 and 4 in the same case.

The plaintiff offered in evidence the legacy return and schedule made to the Collector of Internal Revenue, the same being admitted and marked Exhibits 3 and 4, respectively, in case No. 14,796.

In the case of George D. Bliss, Jr., vs. August E. Muenter, No. 14,730, the following proceedings were had:

Mr. WOODWORTH.—The next case, if your Honor please, is the case of George D. Bliss, Jr., executor of the Last Will and Testament of George D. Bliss, deceased, against August E. Muenter, Collector of the Internal Revenue of the United States, etc. Suit was brought in this case to recover the sum

of $1,497.94. The facts admitted are that the deceased died as stated in the complaint, the assessment and paying of the tax, the filing of the claim, the fact that the money has not been repaid. The will in this case is quite a complicated affair. The will provides, in the first clause, for the payment of funeral expenses and all lawful debts; the second clause declares that no widow, child or children of my deceased son, John O. Bliss, shall have or receive anything whatever from my estate, and specified those who could inherit. The third clause states that all of his property is sole property and no part thereof is community property. The fourth clause gives and devises to his wife, Martha S. Bliss, for and during her natural life, all of the following described land, describing the land:

"The remainder after said life estate in said land, I give and devise to my three daughters, Helen M. Sullivan, Annie Bliss [110] Rucker, and Harriet L. Hermann, share and share alike, provided, however, that if any of my said daughters shall die before the death of my said wife, Martha S. Bliss, leaving issue living at the time of the death of *living at the time of the death of* such daughter, then, and in that event, the share hereby devised to such daughter shall pass to and vest in the said surviving issue of such daughter, by right of representation. I also give, devise and bequeath to my said wife, Martha S. Bliss, for and during her natural life, ten shares of the stock in the Farmers' Ditch Company, a corporation, which has an irrigating ditch running said Deep Creek Field. The remainder after said life estate in

said ten shares of stock, I give, devise and bequeath to my three daughters, Helen M. Sullivan, Annie Bliss Rucker, and Harriet L. Hermann, share and share alike."

Now, the Government has taxed this life estate to some extent; of course it has not taxed the real estate, because it could not do so, as the tax simply pertains to personal property. It has taxed these ten shares, which, of course, could not vest until after her death, and therefore were of a contingent character; and that is the first point that we make. Is there any dispute about that at all?

Mr. CLARK.—I am just looking over this.

Mr. WOODWORTH.—At this time I will introduce the legacy return with the schedules annexed; also a statement of the lawful debts and expenses of administration, and attached thereto is Exhibit "A," which shows the property specifically willed to each beneficiary and the debts and expenses chargeable properly against the same.

The COURT.—What does that show? [111]

Mr. WOODWORTH.—It shows exactly what the Government did tax.

The COURT.—How much?

Mr. WOODWORTH.—The Government did tax this.

The COURT.—I mean how much are those amounts, how much went to each one.

Mr. WOODWORTH.—Of this stock?

The COURT.—Of the entire property that passed.

Mr. WOODWORTH.—The appraised value of the personal property was $194,190.70; the total amount

of lawful debts and expenses amounted to $33,579.73, leaving a clear value of personal property on the 4th of December, 1903, of $160,590.90. Now, the portion to the wife was, of course, exempt. The amounts paid to the various children is as follows: Helen M. Sullivan, daughter of Judge Sullivan—the wife of former Judge Sullivan, $14,872.26; the tax amounted to $111.54. To Annie Bliss Rucker, another daughter, the same amount, and the same amount of tax. To George D. Bliss, executor of the estate, $51,-702.88½; the tax amounting to $581.66. To Richard O. Bliss, a minor, and whose property was left in trust, and taxed, the sum of $51,702.88½, the tax amounting to $581.66; to Harriet L. Hermann, whose property was left in trust but taxed nevertheless, $14,872.26; the tax amounted to $111.54.

Now, as I say, the first property which was taxed by the government officials, and which should not have been, according to our contention, was the ten shares of stock, which, according to the terms of the will were given, devised and bequeathed to the wife during the term of her natural life, thereafter to be turned over to the three daughters. As to those ten shares we contend that there should be a return as to the tax imposed upon those ten shares.

The COURT.—How much was that? [112]

Mr. WOODWORTH.—It has taken a good deal of figuring here. The life interest in ten shares of the Farmers' Ditch Company, appraised at $1,000 a share as per the Government actuary tables—they had no definite way of ascertaining this except by resorting to the Government actuary tables.

The COURT.—Of course, they did not tax the property.

Mr. WOODWORTH.—No, they did not. I was just getting my cue from that, there are so many provisions here. The reversionary interest in ten shares of the Farmers' Ditch Company appraised at $1,000 as per actuary tables; the amount was $142.86.

The COURT.—Imposed on that interest?

Mr. WOODWORTH.—Yes, on the interest of Helen M. Sullivan, on the interest of Annie Bliss Rucker, and the interest of Harriet L. Hermann; that is all, the three daughters. The tax, as I have figured it out—the tax upon that would be at the rate of seventy-five cents a hundred, which, according to my computation, would amount to about $2.14 with each one of them, making the sum of six dollars and something.

The COURT.—How could it be $2.14 if it was seventy-five cents a hundred, and the amount was $142?

Mr. WOODWORTH.—I may be in error with my figures. At any rate it was a very small tax, whatever it was. That is a very immaterial matter, but still it is an item in this case showing the manner in which these officials taxed the life estate.

Going on from that there is a provision devising to the wife the dwelling-house, with the furniture and equipment, and various provisions which are not necessary to be considered here, not being involved.

The next provision is, "I give and bequeath to my said wife, Martha S. Bliss, and my said five children all of the money on hand at the time of my death

after deducting therefrom [113] sufficient to pay all debts due by me at the time of my death, including the expenses of my last illness and funeral expenses, as follows: To my said wife one-third thereof, and to my said children the other two-thirds thereof, share and share alike."

The COURT.—How did it come that the boys got so much more than the girls did?

Mr. WOODWORTH.—That is something I do not know, if your Honor please. You have reference to the boys' share?

The COURT.—I notice in reading these amounts the boys were getting the same, fifty-one thousand dollars and odd, and the daughters were getting fourteen thousand dollars and odd. Perhaps the daughters had received more before.

Mr. WOODWORTH.—Very probably, your Honor. This is a very long will and a complicated affair. The next provision relates to the devises which he has made in the fourth paragraph of his will to his wife, in which he states that he has given her a fair proportion of the estate, and that the acceptance by her shall operate as a waiver of any further claim. In addition to that he makes a family allowance of not exceeding $250 a month.

The fifth clause is: "I give, devise and bequeath to my daughter, Helen H. Sullivan, an undivided one-third and to my daughter Annie Bliss Rucker, an undivided one-third of all of that certain ranch now owned by me, known as the L. C. ranch, except two thousand acres thereof, known as and called the Deep Creek Field, hereinabove described and devised for

life to my wife''—just a devise of real estate, and as I read the statement here has been taxed, which of course is erroneous and illegal.

The COURT.—Where do you find that that has been taxed?

Mr. WOODWORTH.—No, I am in error about that. It is the personal property upon those ranches. I am in error about that.

The next provision devises to his said daughter, Helen [114] M. Sullivan, an undivided one-third, and to his daughter Annie Bliss Rucker, an undivided one-third, of all the water rights of whatever kind and description.

The COURT.—That is real estate.

Mr. CLARK.—There were some share in water companies there.

Mr. WOODWORTH.—Yes. The water rights are not taxed. Then he devises certain shares in said water right, except the ten shares of stock which he gave in the Farmers' Ditch Company, which he devised to his wife for life, which was exempt, of course. He also bequeathed to Helen M. Sullivan and Annie Bliss Rucker an undivided one-third of all the cattle and other live-stock and other personal property on said above-described land, which was taxed by the Government, and as to which of course, with reference to Helen M. Sullivan, and Annie Bliss Rucker, we make no objection at this time.

''The remaining undivided one-third''—here comes the clause, the fifth clause of this—one of the trust features of this will—''of all the property, real and personal, described in this fifth paragraph of my said

last will and testament, left after revising and bequeathing two undivided thirds thereof to my said daughters, Helen M. Sullivan and Annie Bliss Rucker, I devise and bequeath to my son in law, Jeremiah F. Sullivan, in trust, upon the following terms, viz.:

1. To hold the same in trust for my daughter, Harriet L. Herrmann, so long as she continues to be the wife of said George Herrmann.

2. To manage, control and operate the same during the existence of this trust.

3. To pay over to my said daughter annually, the rents, issues, profits and income thereof, after deducting the expenses [115] of managing, controlling and operating the same.

Said trust shall terminate whenever my said daughter ceases to be the wife of said George Herrmann. If my said daughter shall cease to be the wife of said George Herrmann before her death, then, and in that event, the property embraced in said trust, shall vest in fee simple absolute in my said daughter, Harriett L. Herrmann. In case my said daughter dies while she is the wife of said George Herrmann, then, and in that event, the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike."

Mr. CLARK.—Will you permit a suggestion?

Mr. WOODWORTH.—Yes.

Mr. CLARK.—If the Court please, this will is twelve pages long. Part of it vests absolutely personal property, a portion of the legacies mentioned in

the will; there is no doubt about it. Part of it vests property in trust.

Mr. WOODWORTH.—I desire to make the point, so as to take it up on appeal, that none of these legacies vested in absolute possession and enjoyment at the time of the repeal of the law.

Mr. CLARK.—What I was going to suggest was this, your Honor: there are ten pages of this will, and about four or five legacies, and in some instances there are absolute bequests of personal property; that is, bequests directly. It is an impossibility, in making a statement this way to the Court orally, to make a mathematical estimate or arithmetical estimate, which will determine what portion of this tax was in fact levied upon contingent property, and what was levied upon vested property. I was simply going to suggest that this particular case be postponed until the conclusion of some of the others,— [116]

Mr. WOODWORTH.—(Intp.) I would suggest, as I have proceeded thus far, I might go through this matter and then Mr. Clark can take these points down and go over them.

Mr. CLARK.—I cannot say which ones they are at this time.

Mr. WOODWORTH.—I am calling your attention to the fact that the interest of Harriett L. Hermann was left in trust, was not vested; that this interest of Harriet L. Hermann was taxed by the Government in the sum of $111.54. Now, there ought not to be any difficulty about that computation. It is here. I will also call your attention to the ten shares, a small amount,—there is very little compu-

tation there, but every little bit helps.

Mr. CLARK.—What clause do you say in the will makes all of the property which is left to this particular legacy in trust?

Mr. WOODWORTH.—It is the fifth paragraph, which I have just read. She is not to get this money during her life.

The COURT.—She gets the income.

Mr. WOODWORTH.—The income did not amount to $10,000.

The COURT.—She gets the income, but she does not get the property.

Mr. WOODWORTH.—Yes. Will you take my statement that the income did not exceed $10,000; it is the fact. Mr. Bliss is up on one of these ranches, and you know I would not make that statement unless it were true.

Now, the sixth provision, Mr. Clark, relates to a bequest absolutely to George D. Bliss, of said portions of real estate.

Mr. CLARK.—Before passing to that, Mr. Woodworth, would you be willing, in going through this matter, to take up each one of these legacies and *estate* to the Court which ones received vested interest, and which ones received contingent legacies? [117] In the first place, take Helen M. Sullivan, the wife of Jeremiah F. Sullivan, is she not left in the first place a remainder in the shares of stock absolutely, the ten shares of stock of the Farmers Ditch Company?

Mr. WOODWORTH.—Yes.

Mr. CLARK.—That is, she is left that absolutely.

Mr. WOODWORTH.—Of course, the remainder does not take effect during the life time of the mother, and is held in trust.

The COURT.—Yes, it is a vested interest, but its enjoyment is postponed.

Mr. WOODWORTH.—If anything is postponed in enjoyment under the law, no tax could possibly be imposed upon it.

The COURT.—I am not talking about that. You have made a statement that was to my mind erroneous as to the legal effect, as to the vesting of the title.

Mr. WOODWORTH.—I concede that the title vests immediately, but the enjoyment perhaps is postponed until after the death of the mother, which is an uncertain period, and it has been held that it is not subject to tax, an interest of that character.

Mr. CLARK.—I think not. What is the next piece of property?

Mr. WOODWORTH.—The next piece of personalty is one-third of the cash on hand. Of course, that vested at the time.

Mr. CLARK.—You are referring to page four of the will?

Mr. WOODWORTH.—I am referring to page four of the will. You are asking me to take up each one. What else do you desire to know, Mr. Clark?

Mr. CLARK.—That you concede that the money so left her was vested.

Mr. WOODWORTH.—The title was passed. I do not concede it was vested into possession or enjoyment until subsequent to the [118] repeal of the

law, when a final decree of distribution was entered, according to that decision I cited yesterday.

Mr. CLARK.—It might be well to see what is in the will in regard to that. I was going to suggest that the will does not in specific language leave to this daughter one-third of such money on hand. It says, I give, devise and bequeath to my said wife, Martha S. Bliss, and my said five children all of the money on hand at the time of my death, after deducting therefrom sufficient to pay all debts due by me at the time of my death, including the expenses of my last illness and funeral expenses, as follows: To my said wife one-third thereof, and to my said five children the other two-thirds thereof, share and share alike, and if all or any of them be not living at the time of my death, then to the heirs of such of them as are deceased, by right of representation."

Now, I take it, under your Honor's ruling, that so far as cash on hand is concerned, this particular legatee actually received a vested interest in that cash.

Mr. WOODWORTH.—There was another case to which Mr. Clark called my attention yesterday, with reference to the vesting of this estate, a case in accord with that of Farrell versus the United States, holding that until the time for distribution arrives all of these claims are contingent, within the meaning of the taxing law; that was the case of United States versus Marine Trust Company, where the Court said, until the administration is in such a condition, until the estate is ready to pass to the heirs, no assessment can take place; until the administration is in such

condition that the heir is in a position to take the thing to be taxed, the tax cannot be levied.

The COURT.—That doctrine does not appeal to me in the slightest. [119]

Mr. WOODWORTH.—Your Honor holds that is subject to tax?

The COURT.—Yes.

Mr. WOODWORTH.—I will take an exception.

Mr. CLARK.—Now, taking the personal property described on page six of the will.

Mr. WOODWORTH.—The next one is Annie Bliss Rucker.

Mr. CLARK.—I suggest that we go through the Sullivan bequest.

Mr. WOODWORTH.—All the bequests to Helen M. Sullivan are of the same character; there is no trust feature about it. His Honor has ruled that my point is not tenable.

Mr. CLARK.—The next personality is the same.

Mr. WOODWORTH.—I make the same point, there is no use going over that; there is no trust feature about that.

The COURT.—I suppose the same is true as to Mrs. Rucker.

Mr. WOODWORTH.—The same is true as to Mrs. Rucker. The other persons as to whom there is a question with reference to the trust feature of this estate are Richard O. Bliss, who was a minor at that time, and Harriet L. Herrmann, because of her marriage to Mr. Herrmann.

Mr. CLARK.—What particular provision covers that?

Mr. WOODWORTH.—I just read the provision with reference to Mrs. Herrmann.

The COURT.—It is paragraph five.

Mr. CLARK.—You concede in regard to the cases of Jeremiah Sullivan and Annie Bliss Rucker, the clauses are alike in the will.

The COURT.—Jeremiah Sullivan is not a legatee at all.

Mr. WOODWORTH.—He means as to Mrs. Sullivan.

Mr. CLARK.—Then as to Harriet L. Herrmann, you contend there was a trust clause there. As to George D. Bliss, how about that? [120]

Mr. WOODWORTH.—I do not think there is any question of trust about it; I am not quite sure; but I do not think so.

Mr. CLARK.—Do not you concede that the money referred to on page four of the will was left to all of the children absolutely?

Mr. WOODWORTH.—Yes, I think so.

The COURT.—I think you had better take this case and figure out where you are. We cannot consume time here in figuring it out. I have no doubt that you gentlemen will be able to agree upon such a judgment as is to be entered by me. Let the further consideration of this case be postponed, or rather, let it be submitted with the understanding that you will figure it out for yourselves, because it takes up too much time here.

Mr. WOODWORTH.—In the case of Bliss, there is no dispute with reference to the trust estate left to Mrs. Hermann, nor is there any dispute as to the

amount, which is $111.54. With reference to the disposition of the property left to Richard O. Bliss, Jr., upon his arriving at the age of twenty-five, I ascertained this morning upon wiring down to Mr. Bliss, he has just reached the age of twenty-five years six or seven months previous to the death of his father, so that that would dispose of the case, so that the only thing left in this case is $115.14, in addition to the sum of $2.14 for the tax upon those ten shares of stock in the Ditch Company.

Mr. CLARK.—You say he has reached the age of twenty-five?

Mr. WOODWORTH.—Yes, I did. There was no further contest in that case except as to the share amounting to $2.14.

The COURT.—What is the further amount?

Mr. WOODWORTH.—$2.14 and $111.54.

The COURT.—Very well, the plaintiff may take judgment for the sum of those amounts. [121]

Plaintiff offered in evidence a copy of the will of the deceased George D. Bliss, the same being attached to the schedule and return next herein mentioned, in case No. 14,730.

The plaintiff offered in evidence the decree of distribution in the estate of George D. Bliss the same being marked Exhibit one in case No. 14,730.

The Court admitted in evidence the legacy return and schedules made by the estate to the Collector of Internal Revenue, said return and schedule being marked Plaintiff's Exhibit I in case No. 14,730.

[Testimony of B. M. Thomas, for Plaintiff.]

B. M. THOMAS on being called as a witness for plaintiff, was sworn and testified: That all the taxes involved in all of the foregoing cases were paid under protest.

Before the final submission of the foregoing causes and before the Court rendered any judgment therein or made any Findings of Fact or Conclusions of Law, the defendant made in open court a motion for certain findings. Said motion was also incorporated in a writing made and filed with the Court. Said motion was made during the progress of the trial of said cases and at the conclusion of the taking of all of the testimony therein. The motion was the same in each case and in substance was as follows:

1. That the Court, upon the evidence introduced, oral and documentary, find that the legacies or the distributive shares of property upon the passing of which the amount of taxes in question in this case was levied, or assessed, vested in immediate possession or enjoyment upon the death of the deceased by virtue of the death of the deceased and the will of the deceased [122] whose estate is referred to in the complaint;

2. That such legacies or distributive shares of property upon which the Collector of Internal Revenue levied or assessed the amount of taxes in question were not in any respect contingent legacies or shares;

3. That neither the possession nor the enjoyment of any of the legacies or distributive shares of prop-

erty on account of which the amount of taxes in question was levied or assessed, was contingent upon any matter whatsoever;

4. That each of the legacies and distributive shares mentioned in the complaint on account of the passing of which the amount of taxes in question was levied or assessed and paid vested in immediate possession and enjoyment;

5. That each legacy or interest taxed was capable of a clear valuation;

6. That the said clear valuations were correctly ascertained in levying or assessing of the tax;

7. That in no case referred to in the complaint was any tax levied or assessed on any legacy or interest in property except upon the clear value thereof so correctly ascertained, and that the amount of taxes collected was computed and determined in accordance with such clear valuation;

8. That the relationships sustained to the deceased by the persons named in the complaint to whom the legacies or interests therein mentioned passed were ascertained by the Collector and properly considered in computing the tax;

9. That the amount of taxes mentioned in the complaint was levied and assessed only in accordance with the clear value of the property on which the same was computed and in accordance with the relationship of the legatee, the passing of whose legacy interest was in fact taxed. [123]

The Court declined to make any one of the foregoing Findings. The defendant excepted to the refusal of the Court to make such Findings and

excepted to its refusal in the case of each of said requested Findings.

The United States Attorney, in stating that judgment should go for the plaintiff in certain cases, did not consent to the judgments referred to, but merely indicated that in view of the previous ruling of the Court in the case of Union Trust Company vs. Lynch, affirmed by the Circuit Court of Appeals, it would not be contended that this Court should not enter the judgments mentioned.

In the case of the Union Trust Company of San Francisco vs. Muenter, etc., hereinbefore mentioned, after making its Findings of Fact and Conclusions of Law, the Court rendered judgment in favor of the plaintiff on January 18th, 1911, to the effect that the plaintiff should have and recover from the defendant as Collector of Internal Revenue the sum of $1661, being the aggregate amount of taxes assessed, imposed and paid as aforesaid, with the interest on said sum at the rate of seven per cent per annum from May 27th, 1903, the same being the date when said taxes were paid to the then Collector of Internal Revenue.

That defendant complaining of said judgment presents this Bill of Exceptions.

In the case of Louis Rosenfeld and Henry Rosenfeld as trustees vs. August E. Muenter, etc., hereinbefore mentioned, after making its Findings of Fact and Conclusions of Law, the Court rendered judgment in favor of the plaintiffs on January 18th, 1911, to the effect that the plaintiffs should have and recover [124] from the defendant, as Collector of

Internal Revenue, the sum of $3,912.90, being the aggregate amount of taxes assessed, imposed and paid as aforesaid upon the share of the estate of John Rosenfeld, deceased, bequeathed in trust to Louis Rosenfeld and Henry Rosenfeld for and on behalf of the children and beneficiaries above named, to wit: Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld, together with interest on said sum at the rate of seven per cent per annum from July 29th, 1903, the same being the date when said taxes were paid to the then Collector of Internal Revenue.

That defendant complaining of said judgment presents this Bill of Exceptions.

In the case of Eleanor Campbell O'Kelly, etc., vs. August E. Muenter, etc., hereinbefore mentioned, after making its Findings of Fact and Conclusions of Law, the Court rendered judgment in favor of the plaintiff on January 18th, 1911, to the effect that the plaintiff should have and recover from the defendant as Collector of Internal Revenue, the sum of $1,341.09, being the aggregate amount of taxes, assessed, imposed and paid as aforesaid upon the shares of the estate of Allen G. Campbell, deceased, bequeathed in trust to plaintiff, Eleanor Campbell O'Kelly, for and on behalf of the children and beneficiaries above named, to wit: Allen George Campbell, Byrum Cullen Campbell and Caroline Neill Campbell, together with the interest on said sum at the rate of seven per cent per annum from May 12th, 1903, the same being the date when said taxes were paid to the then Collector of Internal Revenue.

The defendant complaining of said judgment presents this Bill of Exceptions. [125]

In the case of Alfred Friedrich et al. vs. August E. Muenter, etc., hereinbefore mentioned, after making its Findings of Fact and Conclusions of Law, the Court rendered judgment in favor of the plaintiffs on January 18th, 1911, to the effect that each of the plaintiffs should have and recover from the defendant as Collector of Internal Revenue, the sum of $108.22, being in the aggregate the sum of $432.88, taxes so assessed, imposed and paid as aforesaid, with interest on said sums of $108.22, to each of said plaintiffs at the rate of seven per cent per annum from July 14th, 1904, the same being the date when said taxes were paid to the then Collector of Internal Revenue.

That defendant complaining of said judgment presents this Bill of Exceptions.

In the case of George D. Bliss, Jr., Executor, etc., vs. August E. Muenter, etc., hereinbefore mentioned, after making its Findings of Fact and Conclusions of Law, the Court rendered judgment in favor of the plaintiff on January 18th, 1911, to the effect that the plaintiff should have and recover from the defendant, as Collector of Internal Revenue, the sum of $111.54 and $2.14, being the amount of taxes assessed, imposed and paid as aforesaid upon the legacy in favor of Harriet L. Herrmann and the reversionary interests in said ten shares of the stock of the Farmers Ditch Company, in favor of Annie Bliss Rucker, Helen M. Sullivan and Harriet L. Herrmann, with interest on said sums at the rate of seven per cent per

annum from February 3d, 1904, the same being the date when said taxes were paid to the then Collector of Internal Revenue.

That defendant complaining of said judgment presents this Bill of Exceptions. [126]

Order Approving and Settling Consolidated Bill of Exceptions.

The foregoing consolidated Bill of Exceptions, duly proposed and agreed upon by the counsel of the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Dated July 8th, 1911.

WM. C. VAN FLEET,
Judge. [127]

Stipulation Relative to Consolidated Bill of Exceptions.

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above and foregoing entitled actions, that the foregoing consolidated Bill of Exceptions has been presented in time, and that it be approved, allowed and settled by the Judge of the above-entitled court, and that the same shall be made a part of the record in said actions and be a consolidated Bill of Exceptions therein.

Dated July 8th, 1911.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.
ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant. [128]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,615.

LOUIS ROSENFELD et al.

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,567.

ELEANOR CAMPBELL O'KELLY

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,796.

ALFRED FRIEDRICH et al.

vs.

AUGUST E. MUENTER, as Collector, etc.

No. 14,730.

GEORGE D. BLISS, Jr.,

vs.

AUGUST E. MUENTER, as Collector, etc.

Stipulation Relative to Exhibits in the Above-entitled Causes.

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above

and foregoing actions that all exhibits introduced upon the trial of the above-entitled actions and now in the custody of the clerk of this court shall be deemed to be included as a part of the foregoing bill of exceptions with the same effect in all respects as [129] if incorporated in said Bill of Exceptions.

In the event the said exhibits are not so numbered as to identify the same, they shall be marked by the Court upon its certifications of this Bill of Exceptions so as to identify the same.

San Francisco, Cal. Dated July 3, 1911.

ROBT. T. DEVLIN,
Attorney for Defendant.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

[Endorsed]: Filed July 8th, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy. [130]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO,
Plaintiff,

vs.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the 1st Collection District of California,
Defendant.

Petition for Writ of Error.

August E. Muenter, the defendant in the above-entitled action, feeling himself aggrieved by the judgment of the above-entitled court entered upon the 18th day of January, 1911, whereby it was adjudged that the plaintiff have and recover from the defendant the sum of $1661.00, with interest on the same, now comes by Robert T. Devlin, his attorney, and petitions said Court for an order allowing him, the said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

And your petitioner will ever pray, etc.

Dated July 7th, 1911.

AUGUST E. MUENTER,
Collector as Aforesaid.
By ROBT. T. DEVLIN,
His Attorney.

[Endorsed]: Filed Jul. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[131]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO,

Plaintiff,

vs.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the 1st Collection District of California,

Defendant.

Assignment of Errors.

Now comes August E. Muenter, as Collector of the Internal Revenue of the United States for the 1st Collection District of California, the defendant in the above-entitled action, by Robt. T. Devlin, Esq., his attorney, and specifies the following as the errors upon which he will rely and which he will urge upon his writ of error in the above-entitled action, to wit:

I.

The Court erred in refusing to make defendant's proposed finding number 1, which is in the words and figures following, to wit:

"1. That the Court upon the evidence introduced, oral and documentary, find that the legacies or the distributive shares of property upon the passing of which the amount of taxes in question in this case was levied or assessed, vested in immediate possession or enjoyment upon the death of the deceased by virtue of the death of the deceased and the will of the

deceased whose estate is referred to in the complaint."

II.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 1. [132]

III.

The Court erred in refusing to make defendant's proposed finding number 2, which is in the words and figures following, to wit:

"2. That such legacies or distributive shares of property upon which the Collector of Internal Revenue levied or assessed the amount of taxes in question were not in any respect contingent legacies or shares."

IV.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 2.

V.

The Court erred in refusing to make defendant's proposed finding number 3, which is in the words and figures following, to wit:

"3. That neither the possession nor the enjoyment of any of the legacies or distributive shares of property on account of which the amount of taxes in question was levied or assessed was contingent upon any matter whatsoever."

VI.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 3.

VII.

The Court *Court* erred in refusing to make defendant's proposed finding number 4, which is in the words and figures following, to wit:

"4. That each of the legacies and distributive shares mentioned in the complaint on account of the passing of which the amount of taxes in question was levied or assessed and paid vested in immediate possession and enjoyment."

VIII.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 4. [133]

IX.

The Court erred in refusing to make defendant's proposed finding number 5, which is in the words and figures following, to wit:

"5. That each legacy or interest taxed was capable of a clear valuation."

X.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 5.

XI.

The Court erred in refusing to make defendant's proposed finding number 6, which is in the words and figures following, to wit:

"6. That the said clear valuations were correctly ascertained in levying or assessing of the tax."

XII.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defend-

ant's proposed finding number 6.

XIII.

The Court erred in refusing to make defendant's proposed finding number 7, which is in the words and figures following, to wit:

"7. That in no case referred to in the complaint was any tax levied or assessed on any legacy or interest in property except upon the clear value thereof so correctly ascertained and that the amount of taxes collected was computed and determined in accordance with such clear valuation";

XIV.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 7. [134]

XV.

The Court erred in refusing to make defendant's proposed finding number 8, which is in the words and figures following, to wit:

"8. That the relationships sustained to the deceased by the persons named in the complaint to whom the legacies or interests therein mentioned passed were ascertained by the Collector and properly considered in computing the tax."

XVI.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 8.

XVII.

The Court erred in refusing to make defendant's proposed finding number 9, which is in the words and figures following, to wit:

"That the amount of taxes mentioned in the complaint was levied and assessed only in accordance with the clear value of the property on which the same was computed and in accordance with the relationship of the legatee, the passing of whose legacy interest was in fact taxed."

XVIII.

The Court erred in finding the facts to be directly contrary to the matters set forth in the said defendant's proposed finding number 9.

XIX.

The Court erred in finding and determining in this case that plaintiffs were the owners of the claim and demand in suit.

XX.

The Court erred in finding and deciding that the plaintiffs had presented to the Collector of Internal Revenue any claim for a refunding of the taxes in question. [135]

XXI.

The Court erred in finding and determining that the plaintiffs and claimants did appeal to the Commissioner of Internal Revenue at Washington, District of Columbia, following the presentation of, or any ruling upon the presentation of any claim to the Collector of Internal Revenue at San Francisco, California, such claim being for the refunding of the taxes in suit.

XXII.

The Court erred in ruling that the Collector of Internal Revenue at San Francisco, California, caused a tax to be levied or assessed by reason of a

legacy or legacies described in the will of the deceased person mentioned in the complaint; the Court has found that such legacies were contingent and did not vest in possession or enjoyment at the time and particularly prior to the repeal on July 13th, 1902, of the War Revenue Act, under which the taxes were imposed; the finding and conclusion of the Court so made in favor of the plaintiffs was based upon the terms of the will of the deceased which left the legacy on account of which the tax was levied or assessed in trust for a certain period of time, at the end of which period the trust was to terminate and possession of the property had by the legatee; the defendant specifies that notwithstanding the possession of the legacies was postponed within the meaning of the statute, the legacy did pass in possession and enjoyment and particularly did pass in enjoyment, and that the legatee was given a vested beneficial interest in the property, and that the tax in question was levied upon only such interest in the property as was given to the legatee; a present valuation was fixed upon the property in view of the fact that the enjoyment and use of the *corpus* of the trust fund was postponed and the defendant [136] assegns as error the ruling of the Court that a clear valuation could not be affixed upon the quantity of interest which did in fact pass to the legatee whose interest was taxed.

XXIII.

The defendant also specifies that it appears from the terms of the will that the legacy so taxed, although the same passed in trust, was an interest which

was the subject of sale and was capable of a clear valuation, and that clear valuation was in fact ascertained by the Collector of Internal Revenue in levying the tax.

XXIV.

The defendant also specifies that even though such legacy was not the subject of sale, nevertheless, the same was capable of a clear valuation which was in fact ascertained by the Collector of Internal Revenue in fixing the tax.

XXV.

The Court erred in finding that the Collector of Internal Revenue had determined the value of the legacy passing into the trust was the value of the property passing into the trust.

XXVI.

The Court erred in making Finding XI, as follows:

"That said income derived from said legacies above named, of the values above set out, to be held in trust as aforesaid, do not, nor does any one of them, amount to the sum of $10,000 each year, or at all."

XXVII.

The Court erred in finding that incomes derived from the legacies referred to in said Finding did not amount in any case to the sum of $10,000.

XVIII.

The Court erred in finding and determining that the legacies under the will of John J. Valentine, on account of the passing of which the amounts of taxes mentioned in the complaint were [137] levied or

assessed, were contingent, and that the passing of the same was contingent.

XXIX.

The Court erred in finding and concluding that said legacies did not vest in possession or enjoyment.

XXX.

The Court erred in finding and concluding, in the case of each legatee, that the clear value of the legacy did not amount to the sum of $10,000.

XXXI.

The Court erred in finding and concluding that the plaintiff was entitled to, and in rendering judgment for the sum of, $1661, together with interest; and in finding and concluding that the plaintiff was entitled to judgment for any sum. [138]

Specifications of the Insufficiency of the Evidence to Sustain the Findings.

The evidence was insufficient to sustain the finding of the Court in each case and in the case of each legacy involved in each case:

1. That the legacy did not pass in immediate possession or enjoyment;

2. That the legacy on account of the passing of which the tax was levied or assessed, was a contingent beneficial interest;

3. That the legacy on account of the passing of which the tax in question was levied or assessed, was not a vested legacy and did not vest prior to July 1st, 1902;

4. That the enjoyment or possession of the legacy was dependent upon and contingent upon some uncertain event;

5. That the possession or enjoyment of the legacy was contingent upon any event whatsoever;

6. That the clear value of the legacy on account of the passing of which the tax in question was levied or assessed was fixed by the Collector as the same as the clear value of the property compromised within such legacy;

7. That the legacy on account of which the tax was levied or assessed, was not a legacy capable of any clear valuation by the Collector of Internal Revenue, taking into consideration the fact that the property passed into the trust and the physical possession thereof was to be held by the trustees for a certain period;

8. That the clear valuation of the legacy was not correctly ascertained or fixed by the Collector of Internal Revenue; [139]

9. *The* the clear valuation of the legacy on account of the passing of which the tax was levied or assessed as fixed by the Collector of Internal Revenue was excessive.

Dated July 10, 1911.

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed Jul. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [140]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO,

Plaintiff,

vs.

AUGUST E. MUENTER, as Collector of the Internal Revenue of the United States for the 1st Collection District of California,

Defendant.

Order Allowing Writ of Error.

Upon motion of Robert T. Devlin, Esq., United States Attorney for the Northern District of California, attorney for the defendant in the above-entitled cause, and upon filing the petition for a writ of error and assignment of errors herein,—

IT IS HEREBY ORDERED that a writ of error be, and it is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the judgment heretofore rendered herein, and other matters and things in said petition and assignment set forth.

Dated July 10th, 1911.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jul. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [141]

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13,761.

UNION TRUST COMPANY OF SAN FRANCISCO (a Corporation), as Trustee Under the Trust Declared by the Last Will of JOHN J. VALENTINE, and EDWARD C. VALENTINE, DUDLEY B. VALENTINE, ELIZA R. VALENTINE, PHILIP C. VALENTINE, and J. J. VALENTINE, Jr., ETHEL STEIN VALENTINE and WILLIAM GEORGE VALENTINE,

Plaintiffs,

vs.

JOHN C. LYNCH, Collector of Internal Revenue for the First District of California,

Defendant.

Clerk's Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing one hundred and forty-one (141) pages, numbered from 1 to 141, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to the sum of $80.20; that said sum will be charged by me in my quarterly account against the United States, for the quarter ending September 30, 1911, and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of August, A. D. 1911.

[Seal] SOUTHARD HOFFMAN,

Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

[142]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between August E. Muenter, as Collector of the Internal Revenue of the United States for the 1st Collection District of California, Plaintiff in Error, and The Union Trust Company of San Francisco, a corporation, as trustee, under the trust declared by the last Will of John J. Valentine, and Edward C.

Valentine, Ethel Stein Valentine, J. J. Valentine, William George Valentine, Dudley B. Valentine, Eliza R. Valentine, Philip C. Valentine, defendant in error, a manifest error hath happened to the great damage of the said August E. Muenter, as Collector of the Internal Revenue of the United States for the 1st Collection District of California, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 9th day of August, 1911, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 10th day of July, in the year of our Lord One Thousand Nine

Hundred and Eleven.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by

WM. C. VAN FLEET.

Judge. [143]

Service of within Writ and receipt of a copy thereof is hereby admitted this 11th day of July, 1911, without waiving any rights with reference to the Bill of Exceptions not having been settled and signed within the last term or proper or any assignment of error having been served and filed.

MARSHALL B. WOODWORTH,

Attorney for Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,

Clerk.

[Endorsed]: No. 13,761. Circuit Court of the United States, Ninth Circuit, Northern District of

California. August E. Muenter, etc., Plaintiff in Error, vs. Union Trust Co. of S. F. et al., Defendant in Error. Writ of Error. Filed July 11th, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The Union Trust Company of San Francisco, a Corporation, as Trustee, Under the Trust declared by the Last Will of John J. Valentine, and Edward C. Valentine, Ethel Stein Valentine, J. J. Valentine, William George Valentine, Dudley B. Valentine, Eliza R. Valentine, Philip C. Valentine, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 9th day of August, 1911, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the Circuit Court of the United States, for the Northern District of California wherein August E. Muenter, Collector of Internal Revenue for the First Collection District of California, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done

to the parties in that behalf.

Witness, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this tenth day of July, A. D. 1911.

WM. C. VAN FLEET,
United States District Judge. [144]

Service of within Citation, by copy, admitted this 11th day of July, A. D. 1911, without waiving any rights with reference to the Bill of Exceptions not having been settled and signed within the last term or proper or any assignment of error having been served and filed.

MARSHALL B. WOODWORTH,
Attorney for Defendant in Error.

[Endorsed]: No. 13,761. In the Circuit Court of the United States for the Ninth Circuit, Northern District of California. August E. Muenter, etc., vs. Union Trust Co. et al. Citation. Filed July 11th, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2031. United States Circuit Court of Appeals for the Ninth Circuit. August E. Muenter, as Collector of Internal Revenue of the United States for the First Collection District of California, Plaintiff in Error, vs. The Union Trust Company of San Francisco (a Corporation), as Trustee, Under the Trust Declared by the Last Will of John J. Valentine, and Edward C. Valentine, Ethel Stein Valentine, J. J. Valentine, Jr., William

George Valentine, Dudley B. Valentine, Eliza R. Valentine and Philip C. Valentine, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed August 31, 1911.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AUGUST E. MUENTER, etc.,
Plaintiff in Error,
vs.
UNION TRUST COMPANY OF SAN FRANCISCO et al.,
Defendants in Error.

Order Extending Time to File Record and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including September 6, 1911, within which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 7, 1911.

WM. C. VAN FLEET.
United States District Judge, Northern District of California.

[Endorsed]: No. 2031. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16, Section 1, Enlarging Time Within Which to File Record Thereof and to Docket Case to and inclg. Sept. 6, 1911. Filed Aug. 7, 1911. F. D. Monckton, Clerk. Refiled Aug. 31, 1911. F. D. Monckton, Clerk.

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
UNION TRUST COMPANY, as Trustee, etc., et al.,
Defendants in Error.
No. 2031

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
ELEANOR CAMPBELL O'KELLY, as Executrix, etc.,
Defendant in Error.
No. 2032

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
HENRY ROSENFELD et al., as Trustees, etc.,
Defendants in Error.
No. 2033

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
vs.
GEORGE D. BLISS JR., as Executor, etc.,
Defendant in Error.
No. 2034

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
vs.
ALFRED FRIEDERICH et al.,
Defendants in Error.
No. 2035

Upon Writs of Error the Circuit Court of the United States for the Northern District of California.

BRIEF OF PLAINTIFF IN ERROR

ROBT. T. DEVLIN,
United States Attorney.
PARKER S. MADDUX,
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

Filed this .....day of October, A. D. 1911.

FRANK D. MONCKTON, Clerk.

IN THE UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
UNION TRUST COMPANY, as Trustee, etc., et al.,
Defendants in Error.
No. 2031

AUGUST E. MUENTER, Collector, etc.,
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AUGUST E. MUENTER, Collector, etc.,
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Defendant in Error.
No. 2034

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
vs.
ALFRED FRIEDERICH et al.,
Defendants in Error.
No. 2035

Upon Writs of Error the Circuit Court of the United States for the Northern District of California.

BRIEF OF PLAINTIFF IN ERROR

ROBT. T. DEVLIN,
United States Attorney.
PARKER S. MADDUX,
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

Filed this .....day of October, A. D. 1911.

FRANK D. MONCKTON, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error.* vs. UNION TRUST COMPANY, as Trustee, etc., et al., *Defendants in Error.*	No. 2031
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error.* vs. ELEANOR CAMPBELL O'KELLY, as Executrix, etc., *Defendant in Error.*	No. 2032
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error.* vs. HENRY ROSENFELD et al., as Trustees, etc., *Defendants in Error.*	No. 2033
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error,* vs. GEORGE D. BLISS JR., as Executor, etc., *Defendant in Error.*	No. 2034
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error,* vs. ALFRED FRIEDERICH et al., *Defendants in Error.*	No. 2035

UPON WRITS OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

These five actions were brought by the respective defendants in error against John C. Lynch, as Collector of United States Internal Revenue for the First District of California, and, upon the expiration of the term of office of said John C. Lynch, were continued against the present plaintiff in error as his successor. The object of the action in each case is to recover certain taxes which are alleged to have been unlawfully imposed upon, and collected from, the legacies in the respective cases under and by virtue of the War Revenue Act of June 13th, 1898 (30 Stat. L. 448), which act was amended by an act of March 2, 1910 (31 Stat. L. 948), then supplemented by the Act of June 27, 1902 (32 Stat. L. 406). In the meantime the Act of April 12, 1902 (32 Stat. L. 500) was passed, wherein it was stated that the Act was to be repealed, the repeal to take effect on July 1st, 1902.

In the first suit the defendants in error are the

trustees under the will and the legatees whose interests were subject to the tax in question.

In the second and fourth suits, the executors are named as the defendants in error

In the third suit, the trustees appear in that capacity.

In the fifth suit, the heirs whose legacies have been taxed, are designated as such.

As will be seen from an examination of the records, the same point appears in each case and that is, whether the personal property and legacies distributed under the terms of the respective wills to the respective trustees in trust and to be held in trust for the respective beneficiaries, are contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment within the meaning of the above named Acts of Congress.

Taking each case individually, the following facts are presented:

In the suit entitled *Muenter vs. The Union Trust Company et al.*, it will be seen that John J. Valentine died on December 21st, 1901, in the County of Alameda, California; that at the time of his death he left a last will and testament which was duly and regularly probated, and the estate was by final de-

cree of distribution distributed in accordance with the provisions of said will, the residue of said estate being distributed by the defendant in error, Union Trust Company of San Francisco, as trustee, to be held in trust for the benefit of the seven children of the deceased, the remaining defendants in error herein, until the youngest child should attain his or her majority, which will be on May 7th, 1920, and not before.

In the second suit, *Muenter vs. O'Kelly,* it appears that Allen G. Campbell died on June 16th, 1902; that he left a last will which was duly probated: that in accordance with certain provisions of that will, certain personal property which was taxed by the plaintiff in error was distributed to Eleanor Campbell O'Kelly as trustee, to be held in trust for the benefit of his daughter, Eleanor Campbell, until this daughter should reach the age of twenty-one years, which will be some time during the year 1921.

In the third case (*Muenter vs. Rosenfeld*) it appears that the testator, John Rosenfeld, died on May 28th, 1902, and that his last will was duly probated and his estate distributed in accordance with its terms. That certain personal property, subject to the tax in question, was distributed to defendants in error, Louis Rosenfeld and Henry Rosenfeld, as trustees for the benefit of the

children of the deceased until a period of eleven years after his death should elapse, provided some one of the children and beneficiaries should so long survive, otherwise the trust should terminte upon the death of the last survivor. This trust does not expire until May 28th, 1913.

In the fourth suit, *Muenter vs. Bliss,* it appears that certain personal property and legacies were distributed under the terms of the will of George D. Bliss, deceased, to certain trustees, to be held in trust for the benefit of one Harriet L. Herrmann, so long as she should remain the wife of ..... Herrmann. At the time of the levy of the tax in question, and at the time of the trial of the suit, Harriet L. Herrmann was still the wife of ..... Herrmann.

In the fifth case, *Muenter vs. Friederich,* the facts show that by the last will of Gustav A. Friederich certain personal property was distributed to two trustees, to be held in trust for the benefit of certain legatees until the youngest of them should attain the age of twenty-one years. This trust expired August 2nd, 1904.

In all cases the income from the property distributed in trust is to be paid to the beneficiaries and in no one instance is the income equal to the sum of ten thousand dollars a year.

ARGUMENT.

These five cases present the following question, namely: Whether the personal property and legacies distributed under the terms of the respective wills to the respective trustees in trust and to be held in trust for the respective beneficiaries, are contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment, thereby becoming subject to the tax within the meaning of the Acts of Congress hereinbefore set forth.

It will be noted that in each case the beneficiaries are to enjoy the income from the property during the life of the trust, and the corpus of the trust is to be managed by the trustees for the sole use and benefit of the various legatees. Under these circumstances it would seem that the legatees are the true owners and that they are having the enjoyment of the property immediately and the tax involved is imposed upon the right of the respective legatees to the enjoyment of their legacies. In other words, the right to the enjoyment of these legacies is a definite property right capable of exact valuation. While the trust property itself did not pass into the hands of the beneficiaries, the right to the income and the right of enjoyment of these legacies is a definite property right capable of exact valuation. While the trust

property itself did not pass into the hands of the beneficiaries, the right to the income, and thereby the right of enjoyment of the property, became immediately vested.

The government has declined to refund to the respective defendants in error the taxes imposed and collected, upon the theory that these legatees had the immediate right of enjoyment coupled with the fact that they had their respective equitable titles for the terms of the respective trusts.

Up to the present time the question involved in these cases has never been definitely settled by the Supreme Court of the United States, although there is now pending before that tribunal a case involving the precise proposition involved in the cases under discussion. Upon this point, there has been a diversity of opinion by various Circuit Courts of the United States.

Recently we had occasion to present to this Court the views of the government in the case of *Lynch, Collector, etc., vs. Union Trust Company of San Francisco,* reported in 164 Fed. 161, in which case the Court held against the contention of the government. Inasmuch as the point involved is one of great interest and importance to the government, and is one of considerable nicety, we submit that upon a

more careful consideration this Court will uphold the views which we now present.

Respectfully submitted,

ROBT. T. DEVLIN,
United States Attorney.

PARKER S. MADDUX,
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
UNION TRUST COMPANY, as Trustee, etc., et. al.,
Defendants in Error.
No. 2031

AUGUST E. MUENTER, Collector, etc.,
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AUGUST E. MUENTER, Collector, etc.,
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AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
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No. 2034

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
vs.
ALFRED FRIEDERICH et al.,
Defendants in Error.
No. 2035

Upon Writs of Error the Circuit Court of the United States for the Northern District of California.

BRIEF FOR DEFENDANTS IN ERROR.

MARSHALL B. WOODWORTH,
Attorney for Defendants in Error.

Edward Lande,
Of Counsel.

IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error.* vs. UNION TRUST COMPANY, as Trustee, etc., et. al., *Defendants in Error.*	No. 2031
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error.* vs. ELEANOR CAMPBELL O'KELLEY, as Executrix, etc., *Defendant in Error.*	No. 2032
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error.* vs. HENRY ROSENFELD, et al., as Trustees, etc., *Defendants in Error.*	No. 2033
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error,* vs. GEORGE D. BLISS JR., as Executor, etc.,	No. 2034
AUGUST E. MUENTER, Collector, etc., *Plaintiff in Error,* vs. ALFRED FRIEDERICH et al., *Defendants in Error.*	No. 2035

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The only question involved in the five above entitled cases is one of law: Whether the legacies taxed by the Government were vested or contingent legacies; if the former, they were subject to taxation; if the latter, they were not subject to taxation on July 1, 1902, the date of the repeal of the Spanish American War Tax Law.

The above entitled five cases were consolidated in the Court below for the purpose of trial; a "Consolidated Bill of Exceptions" was signed and filed in the five cases, which will be found contained in the Transcript of Record in case No. 2031, (Muenter vs. Union Trust Co. of San Francisco). (See page 91 et. seq. of Transcript of Record, in case No. 2031 for "Consolidated Bill of Exceptions").

The Transcripts of Record in the four other cases, to-wit: No. 2032, 2033, 2034 and 2035 do not contain the "Consolidated Bill of Exceptions," but contain the pleadings and such other documents as are pertinent to each separate case.

The learned representative of the Government has filed a "consolidated brief" in the five cases now before this Honorable Court and we presume it is proper for us to follow the same course. Therefore, this brief will constitute our reply brief in the five cases now pending before the Court.

On June 13, 1898, Congress passed a War Revenue measure for the purpose of raising money to defray the cost of the Spanish American war. (30 Stat. 464).

Among other taxes imposed, was one on legacies and distributive shares exceeding $10,000 in actual or clear value and passing from the testator or decedent to certain classes of relatives and to persons not related to the family.

This law was amended on March 2, 1901, in respect to matters not material to the question involved in the above entitled cases. (31 Stat. 948).

The Spanish-American War having been victoriously concluded, Congress, on April 12, 1902, repealed the war revenue law of June 13, 1898, said repeal to take effect July 1, 1902, (32 Stat. 96).

The question arises, whether the legacies or distributive shares became vested on or before July 1, 1902, the date when the repeal of the law became effective, or whether they were of such contingent character as to exempt them from taxation.

Congress, on June 27, 1902, (just four days before the repeal took effect on July 1, 1902), passed a refunding Act, Section 3 of which contains the following:

"Sec. 3 That in all cases where an executor, administrator, or trustee shall have paid, *or shall hereafter pay*, any tax upon any legacy or distributive share of

personal property under the provisions of the Act approved June 13th, eighteen hundred and ninety-eight, entitled "An Act to provide ways and means to meet war expenditures, and for other purposes, and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on *contingent beneficial interests which shall not have become vested prior to July 1st, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1st, nineteen hundred and two.*" (32 Stat., 406; Chap. 1160).

All of the taxes in the above entitled cases for which recovery is now sought from the Government, were assessed and paid to the Government subsequent to the repeal of the law on July, 1, 1902.

A brief epitome of the taxes paid and other salient features involved in the five cases is as follows:

I.

Union Trust Company of San Francisco vs. August E. Muenter, as Collector, etc. } No. 13,761 (in the Court below)

Estate of John J. Valentine.

The legacies from this estate are being held in trust until the youngest of the children, Philip C. Valentine, shall attain his majority, which will not be until May, 7, 1920.

Amount of tax sued for $1661.00.

Amount of tax recovered $1661.00.

Tax assessed May 22, 1903 (nearly one year after repeal of law on July 1, 1902.)

Tax paid May 27, 1903. (nearly one year after repeal of law on July 1, 1902.)

Tax paid May 27, 1903 (nearly one year after repeal of law on July 1, 1902.)

Claim to refund filed June 13, 1903.

Interest computed from May 27, 1903.

Amount of judgment, with interest to January 18, 1911, $2549.49, and costs taxed at $97.30.

II.

Louis Rosenfeld, et al. vs. August E. Muenter, as Collector,etc.	No. 14,615 (In the Court below)

Estate of John Rosenfeld.

The legacies from this estate were to be held in trust until May 28, 1913.

Amount of tax sued for $4062.90.

Amount of tax recovered $3912.90.

Tax assessed July 20, 1903 (over one year after repeal of law on July 1, 1902).

Tax paid July 29, 1903 (over one year after repeal of law on July 1, 1902).

Claim to refund filed June 2, 1905.

Interest computed from July 29, 1903.

Amount of judgment with interest to January 18, 1911, $5958.80 and costs taxed at $26.60.

III.

Eleanor Campbell O'Kelly, -
vs.
August E. Muenter, as Collector, etc. } No. 14,567 (In the Court below)

Estate of Allen G. Campbell.

The legacies from this estate were to be held in trust until the daughter should reach 21 years, which would be some time during 1921.

Amount of tax sued for $1341.09.

Amount of tax recovered $1341.09.

Tax assessed May , 1903 (nearly one year after repeal of law on July 1, 1902).

Tax paid May 12, 1903 (nearly one year after repeal of law on July 1, 1902).

Claim to refund filed May 11, 1905.

Interest computed from May 12, 1903.

Amount of judgment with interest to January 18, 1911, $2062.38, and costs taxed at $28.80.

IV.

Alfred Friederich, et al
vs.
August E. Muenter, as Collector, etc. } No. 14,786 (In the Court below)

Estate of Gustav Friederich.

The legacies from this estate were to be held in trust until August 2, 1904, when the youngest child would attain twenty one years.

Amount of tax sued for $432.88.

Amount of tax recovered $432.88.

Tax assessed July, 1904 (two years after repeal of law on July, 1902).

Tax paid July 14, 1904 (two years after repeal of law on July 1, 1902).

Claim to refund filed July 12,1905.

Interest computed from July 14, 1904.

Amount of judgment with interest to January 18, 1911, $630.60 and costs taxed at $28.40.

V.

George D. Bliss, Jr.
v.
Estate of George D. Bliss.

No. 14,730
(In the Court below)

The legacies from this estate were to be held in trust so long as the daughter of Harriet L. Herrmann should continue to be the wife of George Herrmann, and she was the wife at the time of the repeal of the law on July 1, 1902, and still is such wife.

Amount of tax sued for $1497.95.

Amount of tax recovered $113.68.

Tax assessed February, 1904 (nearly two years after repeal of law on July 1, 1902).

Tax paid February 3, 1904 (nearly two years after repeal of law on July 1, 1902).

Claim filed to refund February 1, 1906.

Interest computed from February 3, 1904.

Amount of judgment with interest to January 18, 1911, $169.05, and costs taxed at $28.00.

In all of the cases, it was admitted by the pleadings and upon the trial that the taxes on the several legacies were assessed by, and were paid to, the Government officials, as alleged in the several complaints; that the taxes were paid under protest in every instance; that the claims to refund said taxes were duly and regularly filed with the proper Government officials and were prosecuted as required by law; and that the Government has not refunded any of said taxes involved in any of the above entitled cases.

As the ultimate question to be decided by this Honorable Court is whether or not the legacies were vested or contingent at the time of the repeal of the law on July 1, 1902, and as this is largely a question of law, we will present this feature of the case in the argumentative part of this brief.

ARGUMENT ~~COMPLAINT~~ AND AUTHORITIES.

We have carefully read the Brief of Plaintiff in Error, and frankly confess that we are unable to ascertain upon what ground a reversal is asked.

The broad contention is made, that the legacies were all vested, (see pages 6 and 7 of Brief of Plaintiff in Error), but not a single authority is cited, nor any argument indulged in, to which we feel called upon seriously to reply.

Indeed, it is to be observed, at the outset, that the assistant United States Attorney,who represented the Government in the Court below, (Mr. George Clark), practically conceded the right of the several plaintiffs in the above five entitled cases to recover judgments.

In the case of the estate of John J. Valentine, (August E. Muenter, etc., Plaintiff in Error, vs. The Union Trust Company of San Francisco, etc., et al. Defendants in Error, No. 2031, in this Court). The Assistant United States Attorney stated to the trial Court: "I think in that case the plaintiff should recover"* * * "That would remove it from any doubt as to whether the decree of distribution would cover this particular claim. I think in that case the plaintiff should recover." (See Transcript of Record in case No. 2031, p. 101).

In the case of the estate of John Rosenfeld, (August E. Muenter, etc., Plaintiff in Error, vs. Louis Rosen-

feld and Henry Rosenfeld, etc., Defendants in Error, No. 2033, in this Court), the Assistant United States Attorney stated to the trial Court: "It would seem to me your honor could make a judgment that the plaintiff recover the tax imposed insofar as it was imposed upon the Trust estate as shown by the exhibits." * * I do not want to be put in the position of consenting to a judgment of that sort. I will say in that case that it appears to be a case coming within the rule of Union Trust Company vs. Muenter." (See Transcript of Record in case No. 2031, p. 106; also p. 109).

In the case of the estate of Allen G. Campbell, (August E. Muenter, etc., Plaintiff in Error, vs. Eleanor Campbell O'Kelly, Defendant in Error, No. 2032, in this court), the Assistant United States Attorney stated to the trial court: "The will is extremely long, your Honor, and I have gone through it hurriedly, and I think that is the provision creating and subjecting the property to control of the mother, and it would seem that the will does come within the rule laid down in the case of Union Trust Company vs. Lynch, and that in this case judgment would go for the plaintiff." (See Transcript of Record in case No. 2031, p. 111).

In the case of the estate of Gustav A. Friederich, (August E. Muenter, etc., Plaintiff in Error, vs. Alfred Friederich et al., Defendants in Error, No. 2035 in this court), the Assistant United States Attorney stated to the trial court: "I think that covers the facts." (See Transcript of Record, p. 119).

In the case of the estate of George D. Bliss, (August E. Muenter, Plaintiff in Error, etc. vs. George D. Bliss, Jr., etc. Defendant in Error, No. 2084, in this court), the following proceeding took place in the trial court: "Mr. Woodworth—In the case of Bliss, there is no dispute with reference to the trust estate left to Mrs. Hermann, nor is there any dispute as to the amount, which is $111.54." * * * "So the only thing left in this case is $111.54, in addition to the sum of $2.14 for the tax upon those 10 shares of stock in the Ditch Company." (See Transcript of Record, pp. 132-133).

The then Assistant United States Attorney, in consenting that judgment should go for the plaintiffs,afterwards qualified his consent as follows: "The United States Attorney, in stating that judgment should go for the Plaintiff in certain cases, did not consent to the judgments referred to, but merely indicated that in view of the previous ruling of the court in the case of Union Trust Company vs. Lynch, affirmed by the Circuit Court of Appeals, it would not be contended that this Court should not enter the judgments mentioned." (See Transcript of Record in case No. 2031, page 136).

There are thirty-one assignments of error, but they all converge to but one single question; Were the legacies vested or contingent on July 1, 1902, the date of the repeal of the law.

It is difficult to conceive upon what theory the learned representative of the Government, under the assignments of error and the condition of the records, hopes to obtain a reversal.

The decisions of the Supreme Court of the United States and of this Circuit Court of Appeals are conclusive upon the proposition that the legacies involved in the cases at bar were all of a contingent character. They did not vest and could not vest absolutely in possession or enjoyment until long after July 1, 1902, the date of the repeal of the law.

Vanderbilt vs. Eidman, 196 U. S. 280; 49 L. Ed. 563.

Lynch vs. Union Trust Co., 164 Fed. Rep. 161.

The allegations of the complaints and the admissions of the answers and the proofs in the five cases at bar show conclusively that the taxes were imposed by the Internal Revenue Collector on legacies which never vested absolutely in possession or enjoyment up to the time of the repeal of the law, which took effect on July 1, 1902 (32 Stat. 96).

Indeed, the legacies in four of the cases now before this Court have not vested, even at the date of writing this brief.

Without encumbering this brief with copious references to the wills in each case, it will be sufficient to state the ultimate facts as to the vesting of the legacies and, in doing so, we refer to the statement of facts contained in the Brief of Plaintiff in Error.

Taking up each case individually, the following facts are presented, which clearly indicate that the legacies are contingent:

In the first case, entitled Muenter vs. The Union Trust Company of San Francisco et al. (No. ~~2130~~ 2031), "The estate was by final decree of distribution distributed in accordance with the provisions of said will, the residue of said estate being distributed to the defendant in error, Union Trust Company of San Francisco, as trustee, to be held in trust for the benefit of the seven children of the deceased, the remaining defendants in error herein, *until the youngest child should attain his or her majority, which will be on May 7th*, 1920, *and not before.*" (See Brief of Plaintiff in Error, pp. 3-4).

In the second case, entitled Muenter vs. O'Kelly, (No. 2032) it appears "that in accordance with certain provisions of that will, certain personal property which was taxed by the plaintiff in error was distributed to Eleanor Campbell O'Kelly as trustee, to be held in trust for the benefit of his daughter, Eleanor Campbell, *until his daughter should reach the age of* 21 *years which will be some time during the year* 1921." (See Brief of Plaintiff in Error, p. 4).

In the third case, entitled Muenter vs. Rosenfeld, (No. 2033) it appears: "That certain personal property, subject to the tax in question, was distributed to defendants in error, Louis Rosenfeld and Henry Rosenfeld, as trustees, for the benefit of the children of the

deceased *until a period of eleven years after his death should elapse provided some one of the children and beneficiaries should so long survive, otherwise the trust should terminate upon the death of the last survivor. This trust does not expire until May* 28, 1913." (See Brief of Plaintiff in Error, pp. 4 and 5).

In the fourth case, Muenter vs. Bliss (No. 2034), "it appears that certain personal property and legacies were distributed under the terms of the will of George D. Bliss, deceased, to certain trustees, *to be held in trust for the benefit of one Harriet L. Hermann, so long as she should remain the wife of George Hermann. At the time of the levy of the tax in question, and at the time of the trial of the suit, Harriet L. Herrmann was still the wife of George Herrmann.*"

(See Brief of Plaintiff in Error, p. 5).

In the fifth case, entitled Muenter vs. Friederich, (No. 2035), "the facts show that by the last will of Gustav A. Friederich certain personal property was distributed to two trustees, *to be held in trust for the benefit of certain legatees until the youngest of them should attain the age of* 21 *years. This trust* e*xpired August* 2*nd*, 1904." (See Brief of Plaintiff in Error, p. 5).

It must be obvious, from this conceded statement of facts in these five cases that the legacies were contingent, beneficial interests which had not vested in absolute possession or enjoyment at the time of the

repeal of the war tax law, which took effect on July 1st, 1902.

The Refunding Act, passed by Congress on June 27, 1902, (just four days before the repealing act took effect on July 1, 1902), provides explicitly that any taxes collected on "contingent, beneficial interests which shall not have become vested prior to July 1, 1902" should be refunded. (32 Stat. 406).

As was appositely said by Judge Morrow in Union Trust Company vs. Lynch, 148 Fed. Rep. 54: "The tax was repealed on July 1, 1902, and after the decree was entered in this case on June 26, 1901, the law itself was only in existence one year and four days, and the statute says specifically that when it is not vested at the time the repealing statute went into effect no tax shall be collected; that is, then the specific command of this statute is that unless a person receives a legacy of more than $10,000 which *vests* in the absolute possession and enjoyment of such person prior to the passing of this repealing act, there can be no tax. That is the *specific, direct, positive, unqualified direction* of the *statute* which this court cannot evade."

The authorities are all one way in our favor on the proposition.

In the leading case of Vanderbilt vs. Eidman, 196 U. S. 480; 49 L. Ed. 563, it was held that the interest of a residuary legatee, conditioned on his attaining a

certain age, cannot be deemed taxable under the war revenue act of June 13, 1898, (30 Stat. at. L. 464, Chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), secs. 29, 30, before the happening of the contingency, in view of the express provisions of those sections as to "possession or enjoyment" and "beneficial interest" and "clear value," and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment is subordinated to an uncertain contingency.

The seventeenth clause of the last will and testament of Cornelius Vanderbilt provided as follows:

"SEVENTEENTH: All the rest, residue, and remainder of all the property and estate, real, personal, and mixed, of every description, and wheresoever situated, of which I may die seized or possessed or to which I may be entitled at the time of my decease. * * * I give, devise, and bequeath to my executors, hereinafter named, and the survivors and survivor of them, IN TRUST, to hold said estate, and invest and re-invest the same, and to collect the rents, issues, income, and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance, and education, and for the care and maintenance of his property during his minority and to accumulate any surplus income, such accumulations

to be paid to him when he arrives at the age of twenty-one years, and thereafter to pay the net income of said estate to him as received *until he arrives at the age of thirty years.*"

Four questions were certified to the Supreme Court of the United States from the United States Circuit Court of Appeals for the Second Circuit, but the Supreme Court only deemed it necessary to consider the third question certified, which was as follows: "III. Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will with the exception of his present right to receive the income of such estate until he attains the age of thirty years prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

This question was answered in the negative by the United States Supreme Court.

Mr. Justice White, now Chief Justice, delivering the opinion of the Court, said, among other things: "In view of the express provision of this statute as to possession or enjoyment and beneficial interests and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested

interest in the case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached. And such is the construction which has been affixed to some statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a present right to possess or enjoy." (Citing Re Curtis, 142 N. Y. 219, 222, 36 N. E. 887; Re Roosevelt, 143 N. Y. 121, 25 L. R. A. 695, 38 N. E. 781. In re Hoffman, 143 N. Y. 327, 38 N. E. 311, Billings vs. People, 189 L. 472, 486, 59 L. R. A. 807, 59 N. E. 798; Howe vs. Howe, 179 Mass. 546, 550, 55 L. R. A., 626, 61 N. E., 225).

And the Supreme Court closed its opinion as follows, "Concluding, as we do, that there was no authority under the Act of 1898 for taxing the interests of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned as his attaining the age of thirty and thirty-five years respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government. In passing, however, we remark that in a case recently decided by the Court of Appeals of New York (Re Tracy, 179 N. Y. 506, 72 N. E. 519) it was declared that such interest was a contingent, and not a vested remainder."

This decision is on all fours with the cases at bar and is conclusive upon the proposition that the legacies were contingent.

The identical question has arisen before this Circuit Court of Appeals in the case of Lynch vs. Union Trust Company, 164 Fed. Rep. 161.

That case is squarely in point. The material facts were:

"Richard H. Follis, a resident of the City and County of San Francisco, died May 31, 1900, leaving a last will whereby, after certain provisions, he left the rents, issues, and profits thereof, and, after necessary expenditures for care, maintenance, insurance, etc: (6) to pay the net proceeds of the income, rents, issues and profits of said trust quarterly, upon the first day of each and every quarter of the year equally, share and share alike to all of my children, Margaret, James, Richard, Mary and George, up to and until such time, as each of them shall respectively attain the ages following, that is to say: Until said Margaret E. Follis, now wife of Dr. De Vecchi, shall attain the age of thirty-nine years; until said James H. Follis shall attain the age of thirty-three years; until said Richard H .Follis shall attain the age of thirty-one years, until said Mary Lily Follis shall attain the age of twenty-nine years, and until said George Clarence Follis shall attain the age of twenty-seven years."

Addressing itself to the question whether these legacies were vested or contingent, the Circuit Court of Appeals for this Circuit, speaking through District Judge Van Fleet, said, (after referring to the leading case of Vanderbilt vs. Eidman, supra, and other cases):

"Applying the principles announced in these cases to the facts here presented, it would seem to be obvious that the interests sought to be taxed under the will of Follis did not fall within the term of the statute. Confessedly the only present right passing to these beneficiaries was that of receiving the income from the corpus of the estate in the hands of the trustees. Such an interest does not, for the reason aptly stated by Judge Gray in Disston v. McLain, fall within the definition of either a legacy or a distributive share, in the sense in which those terms are employed in the Act. It matters not that this right to the income may, as contended by counsel for the government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. It may, indeed, be conceded that this is a correct characterization of the estate conferred. But the question is: Does the Act undertake to impose any burden upon such an interest? Very clearly it does not in express terms; and under the doctrine of strict construction, heretofore referred to, the application of those terms is not to be extended by implication beyond their plain, usual and ordinary sense. As suggested by Judge Gray, the act says nothing about taxing the mere right to an income before that income is actually received; and, had such been the intention, it would have been a very easy matter to express the purpose. Instead, Congress has contented itself, in designating the estates that shall be burdened with

the tax, by employing terms having general and well understood significations, and by those terms must its purpose be limited.

"Moreover, as held in Vanderbilt vs. Eidman, the purpose of the Act was to subject to taxation only beneficial interests which by reason of being absolutely vested in possession or enjoyment have a value capable of being definitely ascertained—"actual value" as expressed in Section 29, or "clear value" as expressed in Section 30. The estate or interest here sought to be taxed was very clearly not of that character. While the right to receive the income was vested, it was a right the enjoyment of which, as with the legatee in Disston vs. McLain, *was contingent upon the beneficiaries living to receive them.*" * * *

"Without pursuing the analogies further, we are satisfied that in no essential particular of the rights of the legatees involved in this case to be distinguished in their legal aspects from those involved in Disston v. McLain, and that, in accord with the conclusion reached in that case, it must be held that the only interest these legatees received under the will of the testator which could probably have been subjected to taxation under the act in question was the amount of income actually received and enjoyed prior to the date when the repeal of the act took effect; and, as that sum as to no one of them reached the amount of $10,000, there was nothing to which the tax could attach."

See, to the same effect, the case of Fidelity Trust Co., etc. vs. United States, Court of Claims, Vol.....

And in the case of Hertz, etc. vs. Woodman, et al., 218 U. S. 205; 54 L. Ed. 1001, while that was a decision in favor of the Government under the facts of that case (which are not pertinent to those involved in the case at bar), the Supreme Court, speaking through Mr. Justice Lurton, is very careful to state that its decision does not apply to contingent interests, (such as are involved in the case at bar), or life estates.

The Court says:"Upon the facts certified, the right of succession which passed by the death of the testator was an absolute right to the immediate possession and enjoyment—a right neither postponed until the falling in of a life estate, as in Mason vs. Sargent , 104 U. S. 689, 26 L. Ed. 894, *nor subject to contingencies*, as in *Vanderbilt v. Eidman*, supra."

The only question involved in the case of Hertz vs. Woodman was this: "Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902, relieve from taxation legacies otherwise taxable under secs. 29 and 30 of the Act of June 13, 1898, as amended by the act of March 22, 1901?"

This question does not arise in the cases at bar; but the question is directly raised, in the cases at bar, as to whether the legacies were vested or contingent,

and Mr. Justice Lurton expressly recognizes that a legacy, postponed until the falling in of a life estate, as in Mason vs. Sargent, Supra, or subject to contingencies, as in Vanderbilt vs. Eidman, is not subject to taxation.

See, also, the following authorities, to the same effect:

Disston vs. McLain, 147 Fed. 114, 77 C C. A. 340.

In re Curtis, 142 N. Y. 219, 36 N. E. 887.

In re Roosevelt, 143 N. Y. 121, 25 L. R. A. 695, 38 N. E. 781.

In re Hoffman, 143 N. Y., 327, 38 N. E. 311.

Billings vs. People, 189 111, 472, 59 L. R. A. 807, 59 N. E. 798,

Howe vs. Howe, 179 Mass. 546, 55 L. R. A. 626, 61 N. E. 225.

Herold vs. Shanley, 146 Fed. 20, 76 C. C. A. 478.

It is a cardinal rule in the construction of statutes imposing taxes, and especially burdens of special or unusual nature, that, in cases of doubt or ambiguity, every intendment is to be taken against the taxing power.

Eidman vs. Martinez, 184 U. S. 578, **583**, 46 L. Ed. 697.

Disston vs. McLain, 147 Fed. 114, **116**, 77 C. C. A., 340.

Lynch vs. Union Trust Co., 164 Fed. Rep. 161, **163**.

Addressing ourselves to the argument contained on pages 6, 7 and 8 of the brief of Plaintiff in Error, we have to say that Counsel is in error when he contends that the legacies in the several cases at bar had vested absolutely in possession or enjoyment.

It is not a mere equitable interest in a legacy which is taxed but the test is, that the tax attaches when there is a present right to the *immediate* possession and enjoyment of a legacy. While the legatees in the several cases at bar undoubtedly had an equitable interest in the several legacies, still they had *no immediate right to the present and absolute possession and enjoyment of the same.* The possession and enjoyment of the legacies was postponed to some time in the future and depended upon contingencies of an uncertain character. The fact was ever present that the legatees might die before the consummation of the contingencies and such were the condition of all of the legacies involved in the several cases at bar at the time the repeal of the war tax law took effect on July 1, 1902.

As was well said by District Judge Van Fleet, delivering the opinion of this Court in the case of Lynch vs. Union Trust Co., 164 Fed. Rep. 161, **166**, "Confessedly the only present right passing to these beneficiaries was that of receiving the income from the corpus on the estate in the hands of the trustees. Such

an interest does not, for the reasons aptly stated by Judge Gray in Disston vs. McLain, fall within a definition of either a legacy or a distributive share, in the sense in which those terms are employed in this act. It matters not that this right to the income may, as contended by counsel for the Government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. It may, indeed, be conceded that this is a correct characterization of the estate conferred. But the question is: Does the act undertake to impose any burden upon such an interest? Very clearly it does not in express terms; and under the doctrine of strict construction, heretofore referred to, the application of those terms is not to be extended by implication beyond their plain, usual and ordinary sense. As suggested by Judge Gray, the act says nothing about taxing the mere right to an income before that income is actually received; and, had such been the intention, it would have been a very easy matter to express the purpose. Instead, Congress has contented itself, in designating the estates that shall be burdened with the tax, by employing terms having general and well understood significations, and by those terms must its purpose be limited."

It is conceded, on the part of the Plaintiff in error that: "In all cases the income from the property distributed in trust is to be paid to the beneficiaries *and in no one instance is the income equal to*

the sum of ten thousand dollars a year."

Counsel for the Government is in error when he states, on page 7 of his brief, that: "Up to the present time the question involved in these cases has never been definitely settled by the Supreme Court of the United States."

The question involved in the several cases now before this Court, viz.: whether the legacies are vested or contingent, was clearly, definitely and unanimously settled by the Supreme Court of the United States in the case of Vanderbilt vs. Eidman, supra, which is the leading case on the subject and which has never been overruled or modified since its rendition.

And the law of this Circuit, following the decision of the Supreme Court of the United States in the case of Vanderbilt vs. Eidman, is to the same effect, and was most clearly announced in Lynch vs. Union Trust Company, supra, a case on all fours, on principle and authority, with the cases at bar.

It is a significant fact that a petition for a writ of Certiorari, made on behalf of the Government, in the case of Lynch vs. Union Trust Company, was denied by the United States Supreme Court (214 U. S. 523; 33 L. Ed. 1007).

Counsel for the Government, in his brief on page 7, ventures the suggestion that there is now pending before the United States Supreme Court a case involv-

ing the precise proposition involved in the cases under discussion.

But he does not refer to any particular case, and our investigations warrant us in stating that there is not at present any case pending before the United States Supreme Court involving the precise proposition raised in the cases at bar. In fact, the Supreme Court of the United States has repeatedly and consistently denied petitions for writs of certiorari in cases raising questions similar to those involved in the cases at bar. As already stated, the decision of the Supreme Court of the United States in the case of Vanderbilt vs. Eidman was unanimous on the question there decided and which is directly raised and involved in the cases at bar.

With all due deference to the learned counsel of the Government, we respectfully submit that, neither upon reason nor authority, has he advanced any substantial ground justifying a reversal of any of the cases at bar, and we confidently maintain that the judgments should be affirmed with costs.

Respectfully submitted,

Attorney for Defendants in Error.

Of Counsel.